

HAS THE ADMINISTRATIVE STATE BEEN ABLE TO ADHERE TO  
CONSTITUTIONAL PRINCIPLES AS IT EXPANDED?

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A thesis submitted to Johns Hopkins University in conformity with the requirements for  
the degree of Master of Arts in Government

Baltimore, Maryland  
August 2021

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## Abstract

This paper answers the question, has the administrative state been able to adhere to constitutional principles as it expanded? The principles of popular sovereignty, limited government, separation of powers, checks and balances, judicial review, and federalism are embedding within the Constitution.<sup>1</sup> To adhere to these constitutional principles, there must be citizen representation, transparency, and accountability. Dwight Waldo had concerns that the federal administration as outlined by Woodrow Wilson would need to function in the spirit of democracy. This paper will look at how the fundamental principles of representation, transparency, and accountability apply in the modern bureaucratic state.

The three chapters investigate different aspects of the federal bureaucracy. First, does the federal bureaucracy display political bias? If there is political bias, then the constitutional principle of citizen representation is absent. Multiple cases are presented in which agencies have been cited for political bias.

Federal agencies produce far more regulations than Congress does. Who are the bureaucrats? Are the people voices being heard in the policy making process? The policy making process can be influenced in various ways. If unelected bureaucrats are making the regulations, the American people have no real pathway to hold them accountable.

Most federal agencies are outsourcing to get expertise needed to fulfill their mission. As more government services have become privatized, this has led to constitutional conflicts.

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<sup>1</sup> Constitutional Principles, *Bill of Rights Institute*. <https://billofrightsinstitute.org/> accessed Aug 3, 2021.

The principles of accountability, oversight, and transparency are found to be lacking in areas where government privatization is utilized.

In the polarized political atmosphere of today, there is little chance of reforming Congress. But if congressional reform were possible, it could hold the members to their constitutional responsibility to make the legislation of the land and stop authorizing federal bureaucrats to develop regulations. To address the lack of constitutional structure an amendment to the Constitution is necessary. Although a arduous process, it has been accomplished twenty-seven times in the history of the Nation when dire situations arose.

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## Chapter 1

### Is There Political bias in the Administrative State?

In the late 19<sup>th</sup> century prior to his presidency Woodrow Wilson was focused in the world of academia. He had studied European models of public administration. This experience would help provide the underpinnings of what would become Wilson's theory of public administration. The United States had changed dramatically since the time of the Founder's. By the late 1870's the United States society had become more complex. Woodrow Wilson advocated for the science of administration.<sup>2</sup> The administration as he saw it would be able to conduct the business of the federal government. He thought that the responsibility of the government in his modern complex time would require 'wisdom, knowledge, and experience' to have authority over corporations.<sup>3</sup> The 454 agencies that comprise the federal bureaucracy oversee many aspects of Americans' lives.<sup>4</sup>

This paper will look at the administrative state as it is in the 21<sup>st</sup> century and how it functions today. The modern federal bureaucracy will be compared to the standard of nonpartisanship as outlined by Woodrow Wilson in the late 1880's. His theory of public administration was based upon the administrators being experts in their field and being free from partisan influence. The focus of this paper will be the federal bureaucracies and has it been able to maintain political neutrality as emphasized by Woodrow Wilson. This will be accomplished by looking at what the administrative state was like, what took place in some widely accepted times of expansion, and how it functions now in the 21<sup>st</sup> century.

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<sup>2</sup> Woodrow Wilson, "The Study of Administration," *Political Science Quarterly*, (July 1887): 198.

<sup>3</sup> Woodrow Wilson, "The Study of Administration," *Political Science Quarterly*, (July 1887): 199.

<sup>4</sup> Federal Register accessed July 23, 2020, <https://www.federalregister.gov/agencies>.

The paper will discuss a variety of scholarly views that both support and oppose the administrative state. The goal of this paper is not to argue the legality of the administrative state although, I think it is important to understand those arguments. But rather I will evaluate if the federal administrative agencies have been able to maintain political neutrality. For federal agencies to undertake the task of regulating labor relations, providing industry safety standards, and the conservation of natural resources the fundamental principle of political neutrality was paramount, according to Wilson. Is the administrative bureaucracy of the 21<sup>st</sup> century politically neutral?

### **History of the Administrative State**

Wilson's writings while in academia were on developing the study of public administration into a science that researched and applied to modern society. He had been influenced by European models of public administration that he had observed and read about.<sup>5</sup> He gave praise to Frederic the Great of Prussia and Napoleon in France for their great achievements in reorganizing the public administrations of their perspective countries.<sup>6</sup> In the late 1800's the United States society was becoming much more urbanized. The population was growing. Wilson wrote, "There is scarcely a single duty of government, which was once simple which, is not now complex."<sup>7</sup> This modern state would have its own personality. The models he studied were from the French and German. Each of these countries had been able to adapt a model of public administration their form of centralized government. How would that adaptation look in the United States? Wilson

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<sup>5</sup> Ronald Pestritto, *Woodrow Wilson and the Roots of Modern Liberalism*. (Lanham, Maryland: Rowman & Littlefield Publishing, 2005).

<sup>6</sup> Woodrow Wilson. "The Study of Administration," *Political Science Quarterly*, (July 1887): 5-7.

<sup>7</sup> Woodrow Wilson. "The Study of Administration," *Political Science Quarterly*, (July 1887): 199.



wrote, “to answer our purposes, it must be adapted, not to a simple and compact, but to a complex and multiform state, and made to fit highly decentralized form of government.”<sup>8</sup>

He acknowledged that mankind had evolved through the centuries from a feudal system into monarchy. From monarchy, societies had advanced to representative governments. But he did not believe that the American people had the intellect to make rational decisions about how their government should function. Society had entered a time when an intellectual approach to governmental function should be applied instead of the sentiments and principles outlined by the Founding Fathers.

The Constitution as written by the Founders does not address how a federal administration would be structured or regulated. Wilson thought the Founders had taken the task of dealing with the circumstances of the time. He believed that the Constitution and the Declaration of Independence needed to be re-analyzed by a new view of the world.<sup>9</sup> A world that was much more industrialized nation than during the Founders time. The population had grown since the Founders. In a speech in 1911 when discussing his view of the Declaration of Independence Wilson is quoted, “If you want to understand the real Declaration of Independence, do not repeat the preface.”<sup>10</sup> In his July 4<sup>th</sup> address in 1914, then President Wilson again shares that the Declaration of Independence was a

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<sup>8</sup> Woodrow Wilson. “The Study of Administration,” *Political Science Quarterly*, (July 1887): 200.

<sup>9</sup> Ronald Pestritto. “Woodrow Wilson: The Godfather of Liberalism,” July 21, 2012, [https://www.heritage.org/node/12232/print-display#\\_ftnref1](https://www.heritage.org/node/12232/print-display#_ftnref1)

<sup>10</sup> Woodrow Wilson, “An Address to the Jefferson Club in Los Angeles,” May 12, 1911, in *The Papers of Woodrow Wilson*, 69 vols., ed. Arthur S. Link (Princeton, N.J.: Princeton University Press, 1966–1993), Vol. 23, pp. 33–34.

document primarily of war and “not the business of our day, for the matter with which it deals is past.”<sup>11</sup>

Prior to his presidency, Wilson developed a theory of public administration. In *the Art of Governing*, Wilson outlined his theory of public administration.<sup>12</sup> His theory was very progressive for the time. Wilson believed that the Constitution was an article of the past. Society had grown beyond anything that the Founders could have imagined. Wilson writes “The period of constitution-making is passed now. We have reached a new territory in which we need new guides, the vast territory of administration.”<sup>13</sup>

This perceived short-sightedness of the Founders had left the roadblocks to the public administration that the United States needed in the modern times of Woodrow Wilson. The separation of powers as outlined in the Constitution would be a hinderance to his theory. The United States as he saw it had outgrown the Constitution. Wilson’s examination of the constitutional history of other nations, he believed that there were three stages of growth that governments encounter. First was the period of absolute ruler.<sup>14</sup> During this period there would be an administrative apparatus that functioned with the absolute ruler. Second was the period in which countries would form a constitution to overcome the absolute ruler. In this period, there would be no administration system, because the focus would on overcoming the absolute ruler period. The third period was the time the nation would develop a new constitution that would embrace a new

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<sup>11</sup> Woodrow Wilson, *Address at Independence Hall: “The Meaning of Liberty.”* The American Presidency Project. <https://www.presidency.ucsb.edu/address-at-independence-hall>. Accessed Aug 4, 2021.

<sup>12</sup> Woodrow Wilson, “The Art of Governing,” Nov 1885, in *The Public Papers of Woodrow Wilson*, vol. 5, p 52. Ed. William Baker and Ray Stannard (1970).

<sup>13</sup> Woodrow Wilson, “The Art of Governing,” Nov 1885, In *the Public Paper of Woodrow Wilson*, vol. 5, p 52. Ed William Baker and Ray Stannard (1970).

<sup>14</sup> Woodrow Wilson, “The Study of Administration,” *Political Science Quarterly*, (July 1887): 7.

administrative system. Public administration as he saw it should be outside the realm of the constitutional guidelines.

Other progressive thinkers of the time had similar views as Wilson. Frank Goodnow was one of these scholars. Prior to Wilson being elected president in 1913, Goodnow one of Wilson's mentors and colleague. Goodnow wrote about the need for a government administration.<sup>15</sup> Like Wilson, he believed that the dedication to the Constitution and the Founder's view of protecting individual rights was outdated. The government needed to be adjusted to allow an administrative structure to provide a wide array of affairs that had become apparent in the nation. Goodnow believed that there needed to be a public administration system within the federal government. But like Wilson, he believed that the constraints of the Constitution could be a stumbling block. Goodnow states, "of the United States Supreme Court, to what extent the Constitution of the United States in its present form is a bar to the adoption of the most important social reform measures".<sup>16</sup>

Wilson was sworn in as President in March of 1913. He wasted no time implementing his progressive theory of public administration into action in the federal government. The Federal Reserve Act of 1913 was signed by Wilson in December of that year. The following year, the Federal Trade Commission Act of 1914 was signed by Wilson. Woodrow Wilson served as President until 1921. During his tenure Wilson enacted many social reforms that protected women, children, and labor workers. He signed Revenue Act of 1913 to reduce tariffs and authorize income tax<sup>17</sup>. Each of these pieces of legislation

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<sup>15</sup> Frank Goodnow, *Social Reform and the Constitution*, (New York: Macmillan, 1911), p311-365.

<sup>16</sup> Frank Goodnow, *Social Reform and the Constitution*, (New York: Macmillan, 1911), p 270.

<sup>17</sup> Ambar, Saladin. *Woodrow Wilson: Domestic Affairs*. University of Virginia. [www.millercenter.org](http://www.millercenter.org) accessed July 22, 2021.

expanded the federal bureaucracy by employing workers and administrators to enforce and oversee the implementation of the new legislation.

Concerns about how to reconcile the growing bureaucracy arose. Dwight Waldo was also concerned that the administrative experts were themselves a political force. He wrote that the dichotomy of public administration and politics is false.<sup>18</sup> Waldo reflected on Wilson's earlier writing directed towards "experts" that would be best suited to rule.<sup>19</sup> But beyond the experts being educated, there was no further suggestion of specifically what other characteristics they should employ. Although Waldo agreed in the need for public administration, he did not clearly agree with how Wilson's theory was unfolding within the structure of the federal government. He believed that although someone could claim to be an expert in their field, this did not provide any assurance of political neutrality. There was the notion that the experts should be nonpolitical. How would that be defined?

Waldo describes politics within the government and administration as firstly, the will of the state being determined. Secondly, the administration would provide the expression of that will. If there was not harmony between these two ideals it would paralyze the government. If you could not guarantee impartiality how much power should an administrator have?

For the government to function efficiently, the administration would be required to be influenced by the political will of the state. But the administration could not be under the influence of the experts from within the bureaucracy. If both were influencing the

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<sup>18</sup>Dwight Waldo, *The Administrative State: A Study of the Political Theory of American Public Administration*, (New York: The Ronald Press Company, 1948), 108

<sup>19</sup>Woodrow Wilson, "The Study of Administration," *Political Science Quarterly*, (July 1887): 197-222.

expression of state policy the agencies would not function properly. If the administration is to function legitimately, the political control must come externally from the state. There must be an objective non-administrative management of the government policies. Political influence of the expression of the will the government from the administrative experts would create disharmony. There are scholars that have concerns of greater magnitude than perceived disharmony. One such author is Sidney Milkis.

Sidney Milkis wrote in *The President and the Parties: The Transformation of the American Party System Since the New Deal* that FDR's New Deal expansion of the administrative state was a direct plan to transformation of the United States government.<sup>20</sup> He argues that FDR took the administrative law making from Congress and partisan politics and placed it largely in the hands of the President. He did this by transforming the Democratic party. He had successfully removed the power of the Democratic Party leadership and placed in his own hands. By doing so, he also redefined the President as a position of power. Milkis believes this maneuver by FDR liberated the executive branch from the grips of Congressional politics to the extent that he controlled the party. It provided FDR with a means to exert his political power on congressmen of the Democratic party during the legislative process. This maneuver strengthened the executive office.

The growing administrative state now was under the partisan politics of the sitting President. There would be no means to maintain nonpartisanship within the administrative state that was directly under the rule of the partisan president.<sup>21</sup> The experts

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<sup>20</sup>Sidney Milkis, *The President and the Parties: The Transformation of the American Party System Since the New Deal*, (New York: Oxford University Press, 1993), 11-51.

<sup>21</sup> Sidney Milkis, *The President and the Parties: The Transformation of the American Party System Since the New Deal*, (New York: Oxford University Press, 1993), 11-51.

that were placed in the bureaucratic positions would surely be selected because of their support to the President's agenda. Milkis saw the New Deal administrative expansion as the means for FDR to redesign the fundamentals of the federal government from Jeffersonian government to a progressive administrative state.

Pestritto's view of President Franklin Roosevelt and the New Deal has some similarities with Milkis.<sup>22</sup> But Pestritto was concerned that if bureaucrats were truly free from political control as suggested by Woodrow Wilson, how could they be held accountable by the people they served. So, the protective layer of political neutrality proposed by Wilson could be perceived as a hindrance to a representative government according to Pestritto. The "idea of separating politics and administration-of grounding a significant portion of the government not on the basis of popular consent but on expertise -was a fundamental aim of American Progressivism and explains the Progressives' fierce assault on the Founders' separation-of-powers constitutionalism."<sup>23</sup> Other scholars focus on what they perceive as the unconstitutionality of the federal bureaucracy.

Hamburger writes that the American administrative state lacks regulation of career bureaucrats by citizen consent.<sup>24</sup> His fundamental argument is that the administrative state as an entity is unconstitutional by design. Hamburger's view is the federal bureaucracy as presently structured makes it virtually impossible to maintain neutrality. Among his arguments, Hamburger describes a common situation in which administrative judges that

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<sup>22</sup>Ronald Pestritto, "The Birth of the Administrative State: Where It came from and What It Means for Limited Government." *First Principal Series*, no. 16 (Nov 2007).

<sup>23</sup> Ronald Pestritto, "The Birth of the Administrative State: Where It came from and What It Means for Limited Government." *First Principal Series*, no. 16 (Nov 2007), 5.

<sup>24</sup> Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2014), 129-191.

are employed by the federal agencies adjudicate cases that arise from regulations that were implemented by the agency's administrators. His concern is that administrative judges who are employed by federal agencies to review these cases are less likely to adjudicate against their employer. The impartiality that comes from the rule of law is abandoned.

John Marini reiterates this same point of contention.<sup>25</sup> Marini states that political neutrality in career bureaucrats is delusion thinking of what he calls the 'universal class, the bureaucracy.'<sup>26</sup> They will insist that they are impartial, but then act in partisan ways. His concern is that they cannot see their own personal bias. They have become so imbedded in their administrative institutions that they are blinded to their own lack of impartiality. Marini writes, "In the last two decades, it has become clear that the bureaucracy can no longer be understood, or justified, in term of its neutrality."<sup>27</sup>The bureaucracy itself has become its greatest defender.

In *The Bureaucrat Kings, The Origins and Underpinnings of the American Bureaucratic State* Paul Moreno views the administrative state as having potential for tyranny. This author provides a history of the development of the administrative state in four waves. He entwines each wave with the political consequences of the time. This author uses the term such 'scandalously irresponsible' when discussing the process of Congress passing vague laws and expecting bureaucrats to define and implement their interpretation of the law.<sup>28</sup> Moreno provides some thoughts into methods to rectify the

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<sup>25</sup>John Marini, *Unmasking the Administrative State, The Crisis of American Politics in the Twenty-First Century*. ed. Ken Masugi (New York: Encounter Books, 2019), 43-81.

<sup>26</sup>John Marini, *Unmasking the Administrative State, The Crisis of American Politics in the Twenty-First Century*. ed. Ken Masugi (New York: Encounter Books, 2019), 8.

<sup>27</sup> John Marini, *Unmasking the Administrative State, The Crisis of American Politics in the Twenty-First Century*. ed. Ken Masugi (New York: Encounter Books, 2019), 57.

<sup>28</sup> Paul Moreno, *The Bureaucrat King*, (Santa Barbara: Praeger 2017), 151.

administrative state of the twenty-first century by returning to the basics of the Constitution. He admits that reform is not possible without the cooperation of Congress.

Dobkin's work provides a different point of view.<sup>29</sup> He focuses on the administrative state of 1970-1990. He believes that the federal bureaucracy has become so large and abusive that it makes oversight impossible. There is no way of assuring nonbiased administrative regulations. The concern of lack of neutrality is compounded by the presidents of modern times being so proficient at writing executive orders. From Dobkin's view, the American people cannot be protected from politically motivated bureaucrats. The bureaucrats in turn cannot be protected from the partisan politics of the executive branch. But not all scholars share the same concerns as the aforementioned authors.

Cass Sunstein and Adrian Vermeule are two scholars that defend the bureaucratic state.<sup>30</sup> Both authors do not view the administrative state as any threat to the livelihood of America. Instead, in their view, it is an essential arm of the government to serve the people. They both believe that there should be broad discretion handed to the federal bureaucracy to manage the safety and wellbeing of citizen.

### **Executive Partisan Influence**

Political bias can be internally from the personal political bias of the career bureaucrats themselves or externally from of a partisan president. If the political

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<sup>29</sup> Donald Dobkin, "The Rise of the Administrative State: A Prescription of Lawlessness." *Kansas Journal of Law & Public Policy* XVII, no. 3 (May 2008): 362-385.

<sup>30</sup> Cass Sunstein and Adrian Vermeule, *Law & Leviathan Redeeming the Administrative State* (Cambridge, Mass: The Belknap Press of Harvard University Press), 5-8.



influence is from the President by means of executive orders this warrants a closer look at the federal register. Woodrow Wilson while President signed 1803 executive orders.<sup>31</sup> Franklin D. Roosevelt signed 3728 executive orders. Barack Obama signed 276 executive orders. Donald Trump to date has signed 169 executive orders. Each of these executive orders has the potential to influence the regulations produced by the administrative state, how a regulation is implemented, or how an agency function. In recent years both Presidents Obama and Trump have signed executive orders that directly impacted the function of the administrative state.

President Trump in October 2019 signed executive order 13891.<sup>32</sup> This executive prevents the use of guidance documents as a means of bureaucrats to privately alter federal regulation to overreach their scope. Guidance documents are utilized by federal agencies to rules, laws, or procedures. President Trump signed this executive order he believes to protect the American citizens from regulatory overreach. This executive order prevents guidance documents from becoming legally binding because they do not go through the rulemaking process as outlined by the Administrative Procedure Act (APA). It places a roadblock in how federal administrative law is managed. This action would hold steady

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<sup>31</sup> United States Federal Register National Archives accessed July 13, 2020, <https://www.federalregister.gov>.

<sup>32</sup> United States Federal Register National Archives, accessed July 13, 2020, <https://www.federalregister.gov>

with President Trumps conservative political view of deregulation.<sup>33, 34</sup> Trump had made deregulation as part of his campaign platform while running for executive office.

In January 2011, President Obama signed executive order 13563 which outlined a plan for federal agencies under presidential control to retrospectively review regulations. This executive order required federal agencies to review existing regulations if they should be updated or even removed. In this executive order President Obama clearly defines what he sees as the role and responsibility of federal bureaucracy. His order opening comment is “Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation.”<sup>35</sup> Over the next two years federal agencies issued and additional 225 new rules under the retrospective review executive order.<sup>36</sup> This executive order and the subsequent consequences of it would affirm President Obama’s progressive view towards the public administrative function of the federal government. These examples show presidential partisan politics utilizing the federal bureaucracy to meet their desires.

In *The State of the Administrative State: The Regulatory Impact of the Trump Administration*, Professor Kathy Wagner-Hill describes a modern federal bureaucracy that

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<sup>33</sup> Law and Justice, Executive Order on Promoting the Rule of Law Through Improved Agency Guidance Documents,

Accessed July 13, 2020, <https://www.whitehouse.gov/presidential-actions/executive-order-promoting-rule-law-improved-agency-guidance-documents/>

<sup>34</sup> Keith Belton and John Graham, “Deregulation Under Trump.” Cato Institute, Summer 2020. <https://www.cato.org> accessed Aug 3, 2021.

<sup>35</sup> The White House President Barack Obama accessed July 14, 2020, <https://whitehousearchives.gov>.

<sup>36</sup> “Assessing Regulatory Retrospective Review Under the Obama Administration”, Brookings Institute, accessed July 18, 2020, <https://www.brookings.edu/research/assessing-regulatory-retrospective-review-under-the-obama-administration/>

is being utilized for political purposes and in a state of chaos.<sup>37</sup> She writes of a twenty-first century administrative state that is clearly influenced and a consequence of presidential politics. Wagner-Hill states that Congressional politics, the executive branch, and the Supreme Court all impact how the federal agencies function. In her article, she focuses on President Trump's administration and concerns about the impact of his attempts to deregulate. The impact of partisan influence of federal agencies can be profound on social, economic, and environmental topics. Presidents of the twenty-first century have devised methods to influence and control what policies are developed and how they are implemented by federal agencies. The dysfunctional political force described in Professor Wagner-Hill's article is unrecognizable by any standards set forth by Woodrow Wilson and Frank Goodnow. Instead of being a politically benign entity that does the work of the government, the federal bureaucracy of the 21<sup>st</sup> century has become a sought after commodity to be harnessed for political gains by either political party.

### **Bias from Within**

Another area to be studied when investigating if the federal bureaucracy of the twenty-first century is politically neutral would be from within the various agencies themselves. A study published in *Journal of Public Administration Research and Theory* researched the political views of government employees.<sup>38</sup> In this study, the authors extrapolated data from National Election Study that had gathered data from 1982, 1984, and 1986 elections. This study compared government employees compared to the private sector in

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<sup>37</sup> Wagner-Hill, Kathy. "The State of the Administrative State: The Regulatory Impact of the Trump Administration." *Emory Corporate Governance and Accountability Review* 6, no. 1 (2019).

<sup>38</sup> James Garand, Catherine Parkhurst, and Rusanne Seoud. 1991. "Bureaucrats, Policy Attitudes, and Political Behavior: Extension of the Bureau Voting Model of Government Growth." *Journal of Public Administration Research and Theory* 1, no. 2 (April 1991): 177-212.

voting behaviors and attitudes. The outcome found three specific points: 1) government employees have a more liberal ideology and views about spending 2) government employees have a higher rate of turnout for voting 3) lastly, government employees are less likely to support republican candidates. Point two of these findings would support John Marini's theory that career bureaucrats have a survival instinct to preserve their careers.<sup>39</sup> Point three of this study can be seen clearly in data gathered by Rothman and Lichter.<sup>40</sup> Data in this research study showed that government employees that self-identify as liberal are more likely to vote democrat. The percentage of bureaucrats that favor the Democratic party is more than the percentage of democrats in the general population.

In reports released by Government Executive shows that of government employees that donated to the 2016 election, ninety-five percent donated to the democratic candidate.<sup>41</sup> Over 2 million dollars was donated in 2016 by federal employees from fourteen agencies. Five percent of those donations went to a republican candidate. For thoroughness, this paper must examine personal political actions from within the workplace.

The Hatch Act was enacted in 1939 and amended in 1990 to limit certain political activities for federal employees. The purpose was to ensure "federal programs were administered in a nonpartisan fashion".<sup>42</sup> It also protected federal employees from

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<sup>39</sup> John Marini, *Unmasking the Administrative State, The Crisis of American Politics in the Twenty-First Century*. ed. Ken Masugi (New York: Encounter Books, 2019), 43-81.

<sup>40</sup> Stan Rothman and S. Robert Lichter, "How Liberal are Bureaucrats?" accessed July 13, 2020. [www.cato.org](http://www.cato.org)

<sup>41</sup> Eric Katz, "Federal Employees are Donating Almost Exclusively to Hillary Clinton." Accessed July 12, 2020. [www.govexec.com](http://www.govexec.com)

<sup>42</sup> Hatch Act Overview. U.S. Office of Special Counsel. accessed July 26,2020, [www.osc.gov](http://www.osc.gov).

political coercion, and ensure employees advanced in the workplace due to merit and not political affiliation. The Office of Special Counsel handles reported Hatch Act violations.

The number of reported Hatch Act violations has declined although not steadily from 2008-2018. In 2008, the Office of Special Counsel reported 445 new complaints that year.<sup>43</sup> In 2018 there were 263 new complaints. Warning letters were sent to 49 employees. Five employees withdrew from partisan races and two employees resigned. Although there is a large decrease in new Hatch Act complaints, these numbers are still in stark contrast to referrals from 2000. In 2000 there were 98 new complaints. These new complaints resulted in twenty-one warning letters and four disciplinary actions. The sharp decline 2008 to 2018 could be a direct result of federal employee workshops on the implications of the Hatch Act. Senator Akaka states there appears to be a discrepancy on how White House appointees are handled versus civil servants.<sup>44</sup> In his testimony, Senator Akaka states that the President is not motivated to reprimand any White House appointees that may have been reported for Hatch Act violations.

Hatch Act violations can vary in levels of severity. Infractions can be the result of wearing a political button on clothing, attempting to obtain partisan political funding, to utilizing federal employees for specific partisan political campaigns. In 2017 the U.S. Postal Service (USPS) was found to be in violation of the Hatch Act. The USPS colluded with the National Association of Letter Carriers (NALC) to endorse and support a specific 2016 presidential candidate. The USPS and NALC worked together to choose which

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<sup>43</sup> Annual Report to Congress for Fiscal Year 2008. Accessed July 26, 2020, [www.osc.gov](http://www.osc.gov).

<sup>44</sup> Hearing before the Oversight of Government Management, The Federal Workforce, and the District of Columbia Subcommittee of the Committee on Homeland Security and Governmental Affairs United States Senate. Accessed July 26, 2020. <http://www.access.gpo.gov/congress/senate>.

candidate to endorse. The USPS allowed carriers to use “union official” leave for campaign activities. The U.S. Office of Special Counsel (OSC) found that these activities had led to institutional bias in favor of the NALC’s chosen candidate.

OSC in 2018 found an Administrative Judge for the Department of Justice Immigration violated the Hatch Act by promoting presidential candidate Hillary Clinton’s proposed immigration plan during a hearing. She was also reported for advocating against the Republican Party’s immigration plan.<sup>45</sup>

This year, Kellyanne Conway in her position as Counsel to the President was found to have violated the Hatch Act. She appeared in her official role during interviews on television. During the interviews, she advocated against a specific Senate candidate. During the same interview, she publicly supported another candidate. In this case Mrs. Conway is a presidential appointee to the White House and the direct authority of the President. Violations by White House appointees’ defaults to the President’s prerogative.

What are the implications of this data in the function of federal agencies? A close look at public documents and available research provides a telling story about political bias from within specific federal agencies.

### **Internal Revenue Service**

In 2010 allegations were brought to light that the Internal Revenue Service (IRS) Determination Unit was targeting conservative organizations tax-exempt status for

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<sup>45</sup> U.S. Office of Special Counsel, Fiscal Year 2020 Congressional Budget Justification and Performance Budget Goals, 43. Accessed July 25, 2020, <https://osc.gov/Documents/Resources/Congressional%20Matters/Congressional%20Budget%20Justifications/FY%202021%20Congressional%20Budget%20Justification.pdf>

review.<sup>46</sup> The allegations were that the IRS was politically targeting Tea Party and other conservative organizations by specifically placing them on a “Be on the Look Out” (BOLO) list. It is reported that the Supervisor of the Determinations Unit ask IRS specialist to place the Tea Party on the BOLO list. It is alleged that between 2010-2012 the IRS changed the criteria “for identifying potential political cases.”<sup>47</sup> A report released in May 2013 by the Treasury Inspector General for Tax Administration (TIGTA) states, “Early in Calendar Year 2010, the IRS began using inappropriate criteria to identify organizations applying for tax-exempt status to review for indications of significant political campaign intervention.”<sup>48</sup> The audit by TIGTA found that supervisors at the IRS had ask their agents to not only utilize inappropriate criteria that identified for review organizations based upon their policy positions, but that they also allowed the inappropriate criteria to remain in place for more than 18 months.

The IRS Determinations Unit also created delays in the process for targeted organizations by requesting unnecessary information. Many organizations that had been requested to provide more information had received cumbersome questionnaire or even required to provide lists of past and future donors. All these interventions by IRS agents were utilized to delay or deter politically conservative organizations from obtaining tax-exempt status.

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<sup>46</sup> Treasury Inspector General for Tax Administration *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review*. May 14,2013. Ref. 2013-10-053. <http://www.treasury.gov/tigta>

<sup>47</sup> Treasury Inspector General for Tax Administration, *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review*. May 14,2013. Ref. 2013-10-053. <http://www.treasury.gov/tigta>.

<sup>48</sup> Treasury Inspector General for Tax Administration, *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review*. May 14,2013. Ref. 2013-10-053. <http://www.treasury.gov/tigta>.

In 2013, at the time of the report, the TIGTA found that the IRS had not fully implemented the corrective recommendations that had been suggested. The TIGTA also found that there were still multiple applications open for review for over 3 years and through 2 election cycles. The TIGTA recommendations based upon this investigation where methods to document better, initiate a process to track applications, and train employees before election cycles.

### **Central Intelligence Agency**

The Central Intelligence Agency (CIA) as with all federal agencies has had a strict policy to maintain political neutrality. Sherman Kent wrote, “Proper relationship between intelligence producers and consumers is one of utmost delicacy. Intelligence must be close enough to policy, plans, and operations to have greatest amount of guidance, and must not be so close that it loses its objectivity and integrity of judgement.”<sup>49</sup> A closer look at the modern-day CIA does not always portray these standards. Unfortunately for the CIA there have been areas where political bias has influenced and altered the accuracy of information assimilated by consultants working for the agency.

Gentry identifies two methods of the intelligence community being politicized.<sup>50</sup> First is when intelligence officials “cook the books” in ways to further personal political or bureaucratic interest. A second method occurs when forces from the outside try to utilize intelligence information selectively to directly affect political policies. One consultant

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<sup>49</sup> Sherman Kent, *Strategic Intelligence for American World Policy*. (Princeton, NJ: Princeton University Press, 1949), 180.

<sup>50</sup> Robert Gates, “Guarding Against Politicization.” *Studies in Intelligence*, Vol. 36, No.5(1992), 5-13.



reported that he withheld important details in his analysis because he had been concerned that the information might be used against the Presidents administration that he supported.<sup>51</sup> This analyst was asked to analyze strategic failures that had taken place during the Carter administration pertaining to the overthrow the Shah of Iran. His analysis had found policy failures within the Carter administration had been partially at fault. The analyst was concerned that if his report were leaked, it would damage President Carter. So, he deleted the most damaging information. A former senior official at the CIA states that analysts would choose to omit details because they felt they were under political pressures. This practice became known as politicizing by omitting.

One of the fundamentals of the CIA is for intelligence personnel to remain politically neutral. Gentry notes that in the history of the CIA there has never been such overt public display of bias the likes of the presidential election of 2016. Retired senior CIA officials became very vocal about their support of candidate Hillary Clinton and their distaste for candidate Donald Trump. The attacks were at times directed toward President elect Trump. Other attacks were through leaks.<sup>52</sup> Has this partisan political bias permeated the bureau? Both James Clapper and John Brennan who were Directors of intelligence agencies until retirement in 2017 have repeatedly attacked President Trump. Another display of political bias within the CIA came in 2004 by a senior analyst who was disheartened about the outcome of the presidential election.<sup>53</sup> She admitted to leaking

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<sup>51</sup> John Gentry, "A New Form of Politicization? Has the CIA Become Institutionally Biased or Politicized?", *International Journal of Intelligence and Counterintelligence*, (2018) 31: 660-661.

<sup>52</sup> John Gentry, "A New Form of Politicization? Has the CIA Become Institutionally Biased or Politicized?", *International Journal of Intelligence and Counterintelligence*, (2018) 31: 648.

<sup>53</sup> John Gentry, "A New Form of Politicization? Has the CIA Become Institutionally Biased or Politicized?", *International Journal of Intelligence and Counterintelligence*, (2018) 31: 655

classified documents about the CIA's methods of interrogation in hopes of damaging President Bush's administration.

### **Environmental Protection Agency**

A study done at the Environmental Protection Agency (EPA) in 2017 was designed to investigate motivations of the participants who develop policy.<sup>54</sup> These authors found that the regulatory development process in this case was being politicized. First, they found there were personal policy agendas at work. Second, there was politicization of the regulatory process by what the authors call the "science charades."<sup>55</sup> This is stating scientific evidence that is not accurate, but rather a means to present policy preference as science. Although this study revealed concerns about the credibility of science being put at risk, the underlying politicizing of the regulatory process by these methods is disturbing.

The point of reviewing this data is not to declare that one political party or the other is superior. But rather to take a clear look at the potential bias from within the bureaucracy as well as from executive orders signed by the President.

The data and examples provided in this chapter do not imply that all federal agencies and civil servants are politically bias. The cases discussed are but a few from the available literature. They are enough to understand that reform is needed. Congress must have a better grasp on regulating the administrative state.

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<sup>54</sup> Susan Dudley and Marcus Peacock, *Improving Regulatory Science, A Case Study of the National Ambient Air Quality Standards*, George Washington University Regulatory Studies Center, June 30, 2017, p 41.

<sup>55</sup> Susan Dudley and Marcus Peacock, *Improving Regulatory Science, A Case Study of the National Ambient Air Quality Standards*, George Washington University Regulatory Studies Center, June 30, 2017, p 44.

Although you cannot remove personal political opinion from federal employees, there must be a pathway to prevent opinion from becoming bias that is threaded within the fiber of policy development or agency implementation. What might reform look like?

### **Possible Reform**

Reforms must be implemented to prevent personal political biases from influencing public policy formation. The underlying philosophy of how to reform the federal bureaucracy will be based upon accepting the need for the services provided by federal agencies, or not. The federal bureaucracy oversees the safety of American food supply, national security, ensures safe labor practice, and environmental protection. The list of services provided by the administrative state are too vast to describe in a short paper. It seems incomprehensible to simply stop providing those services and safety measures. It may be possible to either defer some of the services provided by the federal government to the states or privatize them. Either of these methods would require tremendous planning and coordination between Congress, federal agencies, and the individual states.

If the administrative agencies are to remain within the federal government, an administrative constitution could be an option to form the reconciliation procedure that Waldo found to be lacking. Within the framework of reform, the bureaucracy must be constitutionalized to provide legitimacy and proper oversight of the federal agencies. Otherwise, congressional reform would be necessary. Congress would have to stop delegating their law-making authority to the federal agencies via vague statutes handed to agencies for further development and be directly responsible for all rulemakings.

Philip Hamburger has a sound argument that the federal bureaucracy is unconstitutional.<sup>56</sup> Unfortunately, this argument identifies the problem, it does not present any viable solutions. In his view, the administrative state is unconstitutional in multiple areas. First, there is no guidance in the U.S. Constitution on how the federal bureaucracy is to be authorized or organized. The process by which it functions through authorization from Congress violate the Constitution by deferring congressional legislative responsibility. Although his views may be accurate, they provide no solution.

Although process for constitutional amendments is outlined within the Constitution, this process clearly is not an easy task. In over 200 years since the signing of the Constitution only twenty-seven amendments have been ratified. An effort to embrace the federal bureaucracy as it stands and develop a framework that would be constitutionally sound to incorporate it into the Constitution would be an enormous undertaking. This would require Congress, federal administrators, and the executive branch to negotiate an administrative framework that is functional and constitutionally sound. In the present administration and Congress of 2020, that seems to be more fiction than reality.

The option of dismantling the administrative state obviously presents with enumerable problems also. The biggest of these problems would be lack of motive to do this. Just how would that look and function? How would the federal government manage essential programs like social security, head start, or Medicare? As previously mentioned, some duties could be eventually handed over to state government to manage. There is not responsible means to completely dissolve the federal agencies without disrupting most

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<sup>56</sup> Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2014), 129-191

aspects of American life. It may seem refreshing to think about erasing the problem and starting anew with a so called ‘clean slate.’ But with such a large system of federal agencies intertwined with each other and with the states, it is not a feasible plan.

The authors of *Deconstructing the Administrative State: The Fight for Liberty* discuss what they see as two major hurdles to overcome before any reform can be implemented.<sup>57</sup> First problem is big business alliances with the federal government. Second problem is Congressional reform. Congress is the government body that created the administrative state. Now, the bureaucracy is too large to adequately oversee.

Moreno argues that it will take a constitutional revival by the people to reform the bureaucracy. It will not happen without congressional reform. He argues that Congress will not reform itself without being forced.<sup>58</sup> Legislation with reform in mind has been attempted by members of Congress.

There has been an attempt to provide some reform of the administrative state by making Congress responsible for regulations before they can be implemented. The Regulations from the Executive in Need of Scrutiny Act (REINS Act) was originally introduced to 112<sup>th</sup> Congress in 2011-2013. More recently Senator Rand Paul has reintroduced the REINS Act to the sitting 116<sup>th</sup> Congress, 2019-2021. This legislation would require major federal agency resolutions to be approved by Congress before implementing them.<sup>59</sup> This bill could thwart off two specific areas of concern about the

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<sup>57</sup> E. McGroarty, J. Robbins, and E. Tuttle, *Deconstructing the Administrative State: The Fight for Liberty*. Washington, D.C: Liberty Hill Publishing.

<sup>58</sup> Paul Moreno, *The Bureaucrat King*, (Santa Barbara: Praeger 2017), 151.

<sup>59</sup> H.R. 3972 Regulations from the Executive In Need of Scrutiny Act of 2019, <https://www.congress.gov/bill/116th-congress/house-bill/3972>

administrative state. First, it could help reduce the likelihood of political bias by federal bureaucrats. Secondly, it would halt Congress from delegating their legislative ability to career agency bureaucrats. Although this legislation has gained much support, it still lacks enough congressional support to be passed. Although this bill could potentially reduce agency administrators from imposing their political bias in the regulations they develop, Moreno is concerned that passing this bill would worsen the situation by legitimizing the administrative state.

Although these various visions of reform may or may not be appropriate or applicable, none of them address the concern of political bias and what ramifications it can have in the administrative state. Waldo argues that it is the relationship between public administration and psychology that brings the most clarity. When attention is focused on the intersection of human nature and public administration, rationalism was found to be sparse. Man had a very small part of rationalism. He is largely weak and inadequate.<sup>60</sup> Man is self-seeking and will work to provide for his desires. These insights into human nature seem to merge with the concept of man that the Founders held that man was fallible and needed mechanisms to divert these behaviors in government.

So, if the federal bureaucracy is to be politically neutral, can partisan influence be removed? No, likely political ideology cannot be completely removed from employees within the administrative state and the career bureaucrats. That would be an unreasonable expectation. Mankind cannot completely remove biases and become computers. What could happen is to develop a means of regulation that could reduce the amount of bias within the federal agencies. Bias can only be minimized by first acknowledging that it

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<sup>60</sup> Dwight Waldo, *The Administrative State: A Study of the Political Theory of American Public Administration*, (New York: The Ronald Press Company, 1948), 24-25.

exists. Once that hurdle is undertaken, then administrators will be better equipped to make fair policy decisions. Additionally, the implementation of the REINS Act or similar legislation would not only make Congress accountable for regulations being passed, but it would also provide another step-in oversight to attempt to dissuade personal political bias being woven into public policy that has been developed by federal bureaucrats.

### **Conclusion**

So, can the administrative state as it has evolved in the twenty-first century be held up to the standard of political neutrality that Professor Woodrow Wilson declared so important? Wilson had observed and read about the operational public administration in Germany. But the United States had not embarked upon a similar style of governing because it was not part of the constitutional structure. His theory had not been implemented or proven in a representative government as outlined in the Constitution of the United States. Many scholars have argued that the administrative state itself is unconstitutional. The American people have accepted the federal bureaucracy in their daily lives as a necessity. The focus of this paper has been to assess if the present-day administrative state has been able to maintain political neutrality. Many scholars have voiced concerns that the administrative state as it functions in modern society is virtually impossible to maintain any degree of political neutrality.

Literature shows that a larger percentage of federal employees identify as liberal than conservative. Ninety-five percent of political donations from federal employees went to democratic liberal candidates. It is difficult to imagine that these federal employees can lift off their cloaks of liberal ideology and become neutral for employment purposes. Instead, it is more likely that they would follow their underlying beliefs as a fundamental

truth as they enforce or design regulations for the Americans they serve. This is one major area of concern about non-neutrality of career bureaucrats.

The other area of political influence of the administrative state of the twenty-first century is from executive power. The executive office exerts power over federal agencies by bypassing Congress and signing executive orders. What is lacking is understanding what percentage of executive orders directly influence the policy of federal agencies and impact Americans daily lives. Although President Obama signed 276 executive orders in his tenure it is not clear what the political impact of those orders were relative to the 169 that President Trump has signed. The concrete number does not correlate to the political impact on policy they made. But it appears to be one method of achieving executive goals without the backing of Congress.

It is not clear that political neutrality was ever possible within the administrative state. But the federal bureaucracy of the twenty-first century has virtually no chance of being nonpartisan and politically neutral due to the lack of impartiality from within the federal agencies and the external pressures applied by the executive branch. How does this lack of political neutrality influence policymaking? This paper has provided data where political bias has been seen in various federal agencies. What impact does political bias have in the policy making process of the administrative state?



## **Chapter 2**

### **What Influence Does the Administrative State Exert in U.S. Policy Making?**

The question of “Who would have power and influence over the representative democracy in the United States?” was a concern even prior to the signing of the Constitution. Early in the history of the United States, there were a very limited number of bureaucrats. The federal government and those in its employ were few. Looking to modern times the number of federal agencies and civil servants that are employed by the agencies have grown exponentially. Embedded in the U.S. Constitution is the design of a representative democracy that is comprised of three independent branches of government. The Constitution carefully outlines the responsibilities of each of the three branches. Article 1, section 1 of the Constitution states, “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” Since that time, the United States population has grown as well as the federal bureaucracy, sometimes known as the Administrative State. Although the Constitution has been amended twenty-seven times, the fundamental outline of the representative democracy has not changed. What has changed is how the federal government functions. Although only Congress was given the power of legislation, it is not uncommon for them to authorize federal agencies to develop new regulations. The regulations that federal agencies produce can carry the same weight and consequence as legislation that have been passed by Congress. The policies developed by the non-elected officials within the administrative state do have social and financial impact .

This paper will provide a historical look at how the simple representative democracy of the United States has evolved into the administrative centered government of modern

times. As the federal bureaucratic system has expanded, so have the methods that special interests have found to influence policy decisions. This paper will discuss some of the factors that influence policymaking process. Each federal agency has specific responsibilities and areas of oversight that this paper will review, including the number of regulations they produce. In addition, evaluation of the outcomes of some of these regulations and the financial impact they have on society will be explored.

Heclo described the decentralized design of the American administrative state as “an unmanaged affair.”<sup>61</sup> Initially, the United States was considered a mass democracy. That descriptor faded as a significant bureaucratic state evolved. The U.S. bureaucracies were described as, “naturally weak” by Alexis de Tocqueville.<sup>62</sup> When American bureaucratic developments were compared to those of Germany and France, the U.S. was found to be much less influential and lacking. During the Jefferson administration from 1801-1809, there were 153 federal employees.<sup>63</sup> This scant number did not last long. Thirty years later, the number of federal employees had increased by 150 percent from Jefferson’s 153 to 230.

By 1830, most bureaucrats were chosen from which political party was in power. Federal officials were rotated out of their positions according to whomever had won the election. This was known as the spoils system. This system grew as the loyal party workers demanded federal government positions for their dedication to the party. Prior to the spoils system a British model of appointing bureaucrats had been utilized. This

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<sup>61</sup> Erza Suleiman, ‘In Search of a Role: America’s High Civil Service’, *Bureaucrats and Policy Making: A Comparative Overview*. (New York: Holmes and Meier, 1984), 342-343.

<sup>62</sup> Scott Sandage, *Alexis de Tocqueville: Democracy in America* (New York: Harper Perennial, 2007).

<sup>63</sup> Brian Balogh, *A Government Out of Sight: The Mystery of National Authority in Nineteenth-Century America* (Cambridge: Cambridge University Press, 2009), 112-113.

method meant that local notables would be placed into administrative positions by those elected. In neither of these systems were the bureaucrats seated because they were elected by the people they were to govern.

With the end of the Jacksonian spoils system there was an initiation of a nonpartisan merit-based system at the federal level. The Pendleton Act was signed in 1883. This act created a bipartisan Civil Service Commission. The commission's role was to evaluate federal employee candidates on a nonpartisan merit basis to ensure the patronage system had ended. Candidates for Federal Government jobs would take a competitive exam as part of the selection process instead of by any ties they had to politicians.

During the progressive era, thousands of civil servant positions were created within the Civil Service System. The Pendleton Act was important in two specific areas. First, it provided civil servants protection from the political process. Federal employees would no longer have to worry from one election to another if their position would be in jeopardy due to the newly elected leadership. It ultimately provided civil servant's protection from the political process. Secondly, the Pendleton Act provided career opportunities for bureaucrats desiring to utilize their specialized education or experience in areas such as environment, energy, or other areas that would benefit federal agencies.

Stephen Skowronek in *Building a New American State* points out that the growth of the administrative state was more than just the need for oversight of social policies.<sup>64</sup> He views it as a political battle of who was going to control America's institutions. As with most change in a vast country as the United States, it was accomplished incrementally.

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<sup>64</sup> Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920*. (Cambridge: Cambridge University, 1982.)

As political reformers were trying to deconstruct the old spoils system, they met with staunch resistance from supporters of that system. The process of change was to prove to be very arduous and slow. In Woodrow Wilson's opinion congressional dominance of the political system in America had stymied public administration.<sup>65</sup> Public administration at that time had been micromanaged by Congress. Congressional management of executive agencies had left the bureaucratic state in constant chaos.

Although the growth of the administrative state had been an ongoing process, there are a few periods in American history where rapid growth can be seen. During Franklin D. Roosevelt's (FDR) presidency, the growth of the federal bureaucracy was tremendous. In unemployment and the 1930's and 1940's administrative expansion was one method of combatting the poverty created by the Great Depression. Many new federal government positions were created. The new positions coupled with the birth federal programs such as the Tennessee Valley Authority (TVA) and the Public Works Administration (PWA) created by President F.D. Roosevelt in the 1930's created thousands of federal positions. The growth of the federal bureaucracy continued as the United States entered World War II in 1939.

A second period of rapid growth of the federal bureaucracy was during the 1960's and 1970's. During this time, concerns about social, environmental, and consumer safety arose. Citizens demanded that the government address these new concerns. It was during this period that H.R. 6675 titled Health Insurance for the Aged and Medical Assistance was signed in July 1965 by President Johnson. This legislation became known as

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<sup>65</sup> Woodrow Wilson, "The Study of Administration," *Political Science Quarterly* 2, no. 2 (1887): 197-222.

Medicare. New regulations were developed to address environmental protection and consumer safety issues. These new regulations coupled with the initiation of the Medicare program required more expansion of the administrative state. As the American public requested more government interventions to protect civil right and ensure public safety, the administrative state grew.

Skowronek's argued the expansion of the administrative state is essentially a battle for control and is viewed as a direct threat against the status quo of the existing structure.<sup>66</sup> Forged in political power plays, Skowronek argues that the administrative state lacks coherent vision and purpose, often creating confusion over constitutional boundaries. This was no different during the initiation of Medicare and other social policies that were developed during the 1960's. A battle for control of the bureaucratic agencies meant that they could be politically influenced. Why else would political parties be so adamant to gain control? Goodnow in his work years before had said it was essential that government agents be free from political influence.<sup>67</sup> Would it be possible to demand that government agents remain free from political influence. But enforcing this demand would prove to be a very difficult task. How can you guarantee that federal bureaucrats remain free from political influence and politically neutral as Goodnow suggested? Is it possible to separate a federal employee from his core ideology?

The Founding Fathers had concerns about any one faction becoming too powerful in the government. In the design of government as outlined by the Founding Fathers, they

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<sup>66</sup> Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920*. (Cambridge: Cambridge University Press, 1982.)

<sup>67</sup> F.J. Goodnow, "Politics and Administration: A Study in Government," (1914).  
<https://archive.org/details/politicadadminist00goodrich/page/n3>.

embedded four methods to attempt to prevent faction dominance. First, the separation of the three branches of the federal government, as outlined in the Constitution. Second is the federalism as a design of government. With federalism, the power of the government would be shared by the federal government and the states. Third is the principle of citizen representation. And lastly, the checks and balance that each branch holds by the other branches helps to lessen the likelihood of faction dominance.

The 16<sup>th</sup> Amendment was ratified in 1913. This amendment established the right to impose an income tax by Congress. The Office of Price Administration, founded in 1941, was a federal agency task with the responsibility of making sure that manufactured prices were kept low. The War Board was then established in 1942 was to ensure the government had purchase priority of industrial products needed for wartimes. It would be difficult to argue against the need for either of these federal entities.

The bureaucracy continued to expand throughout the twentieth century. All the while, many Americans professed anti-bureaucracy attitudes. Despite this attitude, citizens in the twentieth century have demanded government intervention in more and more areas of society. Areas such as transportation and many social programs needed improved. New programs were developed to meet these needs. Federal agencies in turn were created to implement the new programs. The Clean Air Act of 1970 and the Consumer Product Safety Act of 1972 were two such pieces of legislation. The Clean Air Act designed to ensure citizens of safe air quality. The Consumer Product Safety Act protected for the consumer from faulty products. Each of these pieces of legislation would require expansion of the federal bureaucracy to implement and enforce the legislation.

Within the federal administrative system, bureaucrats themselves were also an impetus for expansion. Career federal administrators can request agency positions be created to better serve the agency mission. Other administrators might expand their agency budget or role for job security. When Congress votes on new legislation, many times it requires administrative experts to define the new regulations. This process in turn may require additional federal bureaucrats to design, implement, oversee, and enforce the new regulations.

### **Entanglement of the Administrative State and Policy Making**

While campaigning during the election of 1912, a debate was initiated between candidate Woodrow Wilson and Theodore Roosevelt about how to address concerns about large corporate trusts that had evolved and were exerting influence in the financial markets. Both candidates had different opinions on how to approach this concern. Roosevelt believed that a national commission should be developed by the federal government that could regulate the trusts. The commission he envisioned would be under the control of the executive branch. It would employ experts in the banking field that would be best at understanding how the trusts worked. Because the corporate trusts had become so influential in the financial market, Roosevelt believed that the commission would be best to provide regulations to diminish the control that the trusts had developed.

Wilson on the other hand was concerned that such a commission could potentially be filled with experts that had previously been part of the trusts themselves. If this were true, this maneuver could potentially allow the trusts to self-regulate. In a broader view of the situation, it would allow the corporate trusts to control the government through the

commission. Wilson was concerned about giving experts in the employ of the commission ‘unguided discretion’ it could create corporate monopolies.<sup>68</sup>

A reality of the federal bureaucracy growth is that it has become exceedingly difficult for Congress to pass very specific legislation for a variety of reasons. First, is that Congress lacks specialized knowledge that may be needed to fully understand what precise legislation needed to address a concern in a topic such as air quality. Secondly, Congressional seats are elected positions. Ambitions for re-election can lead politicians to seek legislation that is acceptable in the eyes of their constituents. Voting for ambiguous legislation allows members of congress to appear to support their constituents’ views. Compromise in Congress rarely produces focused legislation. Instead, passing vague legislation and authorizing federal bureaucrats to develop the rule has become the norm.

A concern with this process is that federal bureaucrats writing regulations could be influenced. This could lead to an undesirable influence on public policy. This argument has continued throughout much of the history of the United States. Some citizens and politicians have been concerned that the power to produce regulations have been turned over to non-elected officials with no direct accountability by the people.<sup>69</sup> Once the impact of the administrative state was realized, reforms were implemented.

Cook introduces the term neutral expertise with regards to bureaucrats with rulemaking authority in public policy making process. If administrators could claim political

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<sup>68</sup> Brian J. Cook, “Curing the Mischiefs of Faction in the American Administrative State,” *American Review of Public Administration* 46, no. 1 (2015): 3-27.

<sup>69</sup> Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: Chicago University Press, 2014.)



neutrality, then any concern with personal bias in the rulemaking process would be a moot point. But special interest influence on bureaucrats could come from politicians also. So, even neutral experts in the employ of federal agencies could be influenced by special interests. Cornelius Kerwin provides a list of influencing factors on policy making.<sup>70</sup> His list includes (1) Congress, (2) the President, (3) the court system, (4) other federal agencies, (5) special interest groups, (6) and the press. In the next section, I will provide a closer look at special interest groups and how they can influence the policy making process.

### **Interest Groups Role in Policy Making**

The role federal agencies play in the modern administrative governance of the United States is vital. The services and benefits that these agencies provide to the average citizen are enumerable. The services range from physical protection, unemployment benefits, environmental protection, to financial market stability. What may not be so clearly understood is how federal agencies are authorized to interpret legislation that Congress, or the President mandates have given the agency. In a recent press conference, President Biden was quoted as giving the Department of Justice the task of 1) within 30 days “will issue proposed rule to stop the proliferation of ‘ghost guns’ 2) within 60 days will issue proposed rule to clarify about a device that turns a pistol into a short-barreled rifle, and 3) within 30 days will publish model “red-flag’ legislation for states.”<sup>71</sup> To produce legislation like this, it is the responsibility of Congressional as stated in the Constitution.

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<sup>70</sup> Cornelius Kerwin, *Lobbying and the Regulatory Process*. (Washington, D.C., 2010). C-Span. C-span.org.

<sup>71</sup> White House Statements and Releases April 7, 2021.

<https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/07/fact-sheet-biden-harris-administration-announces-initial-actions-to-address-the-gun-violence-public-health-epidemic/>

Federal agencies typically employ well educated specialist in their field who are thought to be better qualified to design more narrow regulations than politicians. How in this process can special interest groups influence federal administrative policy making? An interest group is any organized group that has organized to promote a specific ideal or point of view. They have a common goal of achieving their desired outcome by influencing the policy making process. The influence may be inserted in the agenda setting period, the data gathering process, the drafting process, or the implementation process.

The special interest groups may be large influential corporations, unions, or religious organizations to name a few. There are organizations that are termed “Astroturf” groups. These groups are quasi-grass roots organizations that are created and utilized by large business interests as instruments of influence. The impact of special interest groups has grown since their inception. Now there is virtually an organization for almost every cause in society. Presently, there are over 170 public interest groups registered with the federal government.<sup>72</sup> These interest groups have avenues to approach the President, Congress, and the federal agencies themselves. Special interest groups may not be new, but what is new is the vast number of these organizations and the methods by which they can advocate for a specific cause or philosophy.

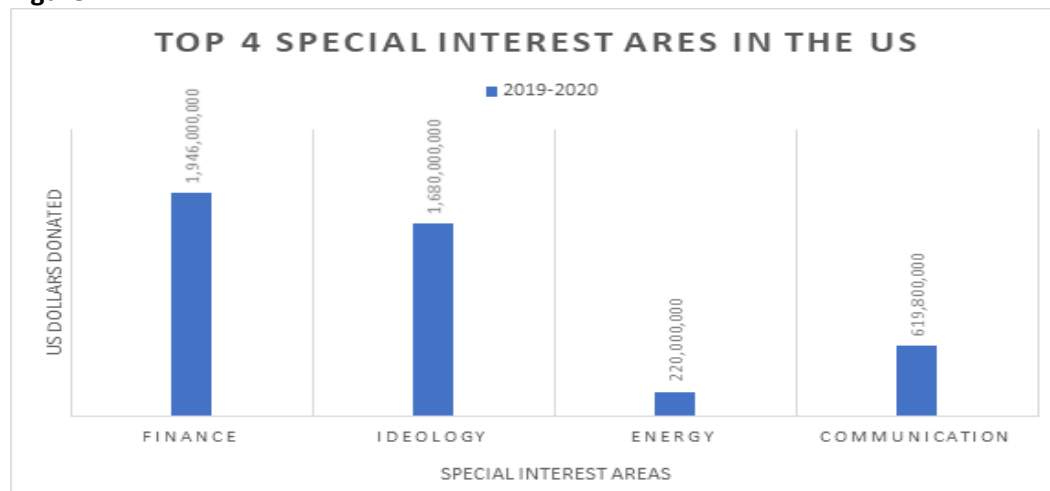
The special interest groups for either pro-life or pro-abortion alone have over thirteen million dollars contributed in 2019 by the top organizations that focus on promoting

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<sup>72</sup> U.S. Department of Housing and Urban Development.  
[https://www.hud.gov/program\\_offices/gov\\_relations/oirpublicinterestgroups](https://www.hud.gov/program_offices/gov_relations/oirpublicinterestgroups). Accessed 4/10/2021.

policies that are supportive to their respective goals.<sup>73</sup> Figure 1 shows the amount of money that is spent to develop or shape policies that will favor individual ideals in four special interest areas. There is over 3 trillion dollars donated to various groups or politicians to influence policies related to the four areas in the graph. Communications would include telecommunications and social media companies such as Facebook and Twitter. Ideology designation includes issues such as environment, healthcare, gun control, and abortion. Finance includes issues involving insurance companies, real estate, investment firms, and commercial banks. Energy includes natural resources such as oil and gas companies, electric utilities, and mining industry.

**Figure 1**

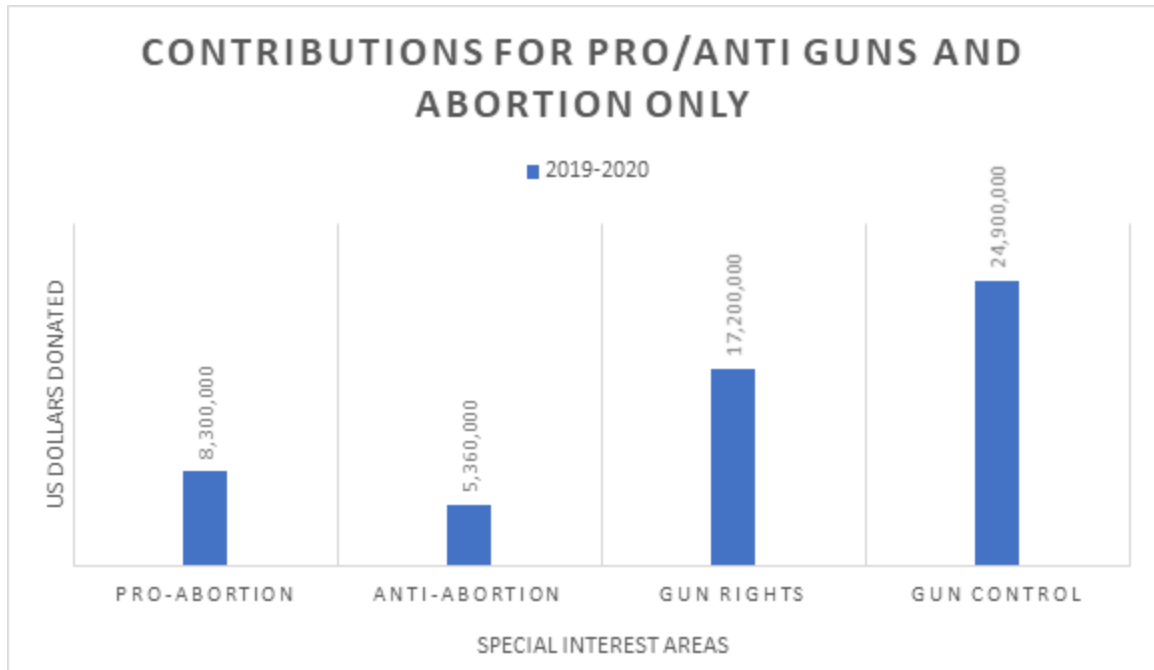


Data Source: Center for Responsive Politics. <https://opensecrets.org/industries/>. Accessed May 5, 2021

A close look at two of the most heated political topics alone, gun rights and abortion, contribute millions of dollars from special interest groups either supporting or opposing these topics. The money is spent in various methods that attempt to influence policies on these topics. Figure 2 breaks down the contributions from the top four special interest groups either supporting or opposing these two topics.

**Figure 2**

<sup>73</sup> OpenSecrets.org. Center for Responsive Politics. "Influence and Lobbying of Special Interest Groups in U.S.," <https://www.opensecrets.org/influence/> (accessed May 3, 2021).



Data Source: Center for Responsive Politics. <https://opensecrets.org/industries/>. Accessed May 5, 2021

The financial resources of special interest groups coupled with social media outlets have been able to provide an international voice for specific causes. The structure of special interest groups has evolved. Many are very structured with legal teams and endless resources to promote their cause. Others are poorly structured and disorganized. Social media has had a tremendous influence on the amount of people that can be reached as well as improved funding for these groups.

### **Administrative Agencies Issuing Regulations**

After a short review of history of the federal bureaucracy and its expansion, it is time to look at how it regulations and influences policy. As of November 2018, there were 445

federal agencies and commissions within the fifteen department. Each agency has a different mission and set of responsibilities. One responsibility for an agency administrator in the modern administrative government is to “fill in the blanks” left by congressional legislation. Over time, it has become easier and involves less political liability to let federal agencies to fill in more of the blanks for Congress.<sup>74</sup> It takes less effort to have a federal agency draft a regulation than it does to draft and pass a law through the legislative pathway as outlined in the Constitution. A small percentage of bills brought to Congress survive the process to become law.

The significance of this can be seen when comparing the number of laws passed by Congress versus the number of regulations promulgated by the administrative state. In 2006, Congress passed 321 new laws through the legislative pathway. In that same year, the federal agencies in the administrative state promulgated 3718. That is one legislative law for every eleven new regulations from federal agencies. In 2016, Congress passed 214 new laws through the legislative pathway. Federal agencies announced 3853 new regulations in the same year.<sup>75</sup> These figures show that for every one new law that is drafted and survives the rigors of the congressional legislative pathway, that eighteen new regulations are put into effect by federal agency bureaucrats. The regulations that are promulgated by federal bureaucrats are done without any representation from the citizens.

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<sup>74</sup> William Kovacs, “The Riddle of How Agencies Can Make So Many Laws Easier Than Congress,” U.S. Chamber of Commerce, December 19, 2017, <https://www.uschamber.com/series/above-the-fold/the-riddle-how-agencies-can-make-so-many-laws-easier-congress>. (accessed May 3, 2021).

<sup>75</sup> Congressional Research Service. *Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the Federal Registry*. Updated September 3, 2019, accessed May 3, 2021 <https://fas.org/sqp/crs/misc/R43056.pdf>.

What are the concerns about this modern administrative state governance? First, the U.S. Constitution outlines a Federal Democratic republic. By design the Legislative branch solely was given the privilege of developing laws to govern society. Federal agencies are under the control of the executive branch to ensure the law of the land is implemented. The career bureaucrats within the federal agencies that draft regulations and “fill in the blanks” for Congress have not been elected by the people. This leaves federal bureaucrats not directly accountable to the citizens for which they are regulating.

### **Public Policy Officials Views**

Just who are these bureaucrats that draft policy? Do their beliefs and values resemble U.S. citizens for which they are developing regulations? Do they have a strong understanding of the people they are make rules for? A survey was conducted of government officials that are part of the policy-making process.<sup>76</sup> Respondents to the survey were White House staff, Civil Service employees, and policy making community such as economist and public policy analyst. These respondents were chosen due to the enormous roles they play in governance in the modern administrative state.

This survey focused on the attitude and knowledge of bureaucrats about the general population. If the bureaucrats are given the ability to govern the American people, how do they compare to those they govern? First, the data showed that the respondents surveyed were much more educated than the average American. The public officials

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<sup>76</sup> Jennifer Bachner and Benjamin Ginsberg, *What Washington Gets Wrong: The Unelected Officials Who Actually Run the Government and Their Misconceptions about the American People* (New York: Prometheus Books, 2016),14-50.

were four times more likely to have a bachelor's degree and five times more likely to have a master's degree than the general population.

The median income for the bureaucrats was more than the median income of U.S. citizens. Civil servants starting salary range is 25% more than the median income of the general public. Overall, public officials in the policy-making process differ demographically from the general public.

A third variable shown in the data is that bureaucratic respondents are much more understanding of the political world and their role in it compared to the general public. When political ideology was surveyed the data showed that the public official respondents had a much stronger commitment to their ideology than the general public. The percentages of ideologies labeled as liberal, moderate, or conservative were not statistically like the percentages of the same in the general public. Political party identification had similar data. The percentage of survey respondents that identified as Democrat were 5-11 percent higher than the percentage of registered Democrats in the general public. Twenty-nine percent of the survey respondents identified their political party affiliation as Republican while 39 percent of the American people identify as Republican. This leaves a 10 percent discrepancy between civil servants and the general public they are to represent.

The same survey conducted by Bachner, and Ginsberg surveyed the public officials about their understanding of the age, race, and income of those they govern. To develop regulations for those to be governed a clear understanding of whom the governed are necessary. The data showed that 52 percent inaccurately responded to the number of

African Americans in the general public<sup>77</sup>. Almost 79 percent of the respondents underestimated the number of white Americans. Eighty percent of the respondents inaccurately estimated the number of citizens that are sixty-five years or older. Sixty-four percent of the respondents underestimated the median income of the general public.

When these same public official respondents were asked their opinions of how knowledgeable they believed the American's people were in specific policy areas. The results paint a dim picture of public officials view of the American people that they are regulating. The data presented in figure 3 shows public officials' opinions of Americans related to policy areas in modern society.

FIGURE 3.

<b>Americans Knowledge of Policy Area as Perceived by Government Officials</b> <i>(Valued as Percentage of Respondents)</i>					
	A Great Deal	Quite a bit	Some	Very Little	None
Social Security	5.6	17.1	37.4	38.5	1.5
Public Schools	4.4	19.1	39.9	36.4	0.9
Welfare	2.6	7.0	32.3	55.1	2.9
Environment	1.2	5.0	30.5	58.9	4.4

*Data Source:* Jennifer Bachner and Benjamin Ginsberg, *What Washington Gets Wrong: The Unelected Officials Who Actually Run the Government and Their Misconceptions about the American People*.

These figures clearly show that public officials do not think much of their perception of what Americans know of important social issues. In four very important social issues in

<sup>77</sup> Jennifer Bachner and Benjamin Ginsberg, *What Washington Gets Wrong: The Unelected Officials Who Actually Run the Government and Their Misconceptions about the American People* (New York: Prometheus Books, 2016),93-98.



America, the public officials felt that greater than seventy-five percent of the general public had some, very little, or no knowledge of these issues.

An overview of this information shows that the public servants that were surveyed did not have an accurate picture demographically of the of the general public. Also, they were dissimilar in terms of education and income to the Americans for which they are regulating. And they certainly do not think highly about the perceived knowledge base of Americans towards important social issues. The statistics presented reveal that the respondent's ideology and the strength of those convictions are much different than the general population. So, can bureaucrats with dissimilar beliefs and poor understanding of the general population produce regulations that would represent the will of the of citizens?

### **Cost Analysis of Federal Agency Regulations**

The financial impact of new regulations is part of the policy drafting process. One task of the Office of Management and Budget (OMB) is to provide a report of cost analysis of regulations enacted in the past ten years. The cost and benefit of new regulations can be a very difficult task. The OMB annual report is very comprehensive. The OMB has acknowledged that the review process has limitations. Given the high number of regulations that are enacted annually, the OMB only tracks regulations that are ear-marked as major. A major regulation means that the financial impact of it is expected to be over

\$100 million in a year.<sup>78</sup> This screening methodology leaves potentially thousands of regulations not analyzed.

Another limitation of the OMB method of evaluating the financial impact of federal regulations is that it does not include regulations drafted by the Federal Communications Commission (FCC) and the Securities Exchange Commission (SEC). Also, the OMB annual report includes only those regulations that include estimated cost/benefit analysis as part of the agency policy drafting process. In 2013, there were more than 3200 new regulations published. Over five hundred of those regulations enacted by federal agencies that were designated as major. When following the guidelines utilized by the OMB in the annual report only 115 of the over 500 new federal regulations were included. That is less than 25% of the of the major regulations were in the annual report. Overall, that is 0.035 percent of the total regulations that were passed were in the OMB annual report.

A third limitation of the OMB's method of evaluating the cost of new regulations is that is based on the expected values, not actual figures. Expected values can be inaccurate.<sup>79</sup> Prices of products and services can fluctuate month to month. A look at regulations enacted by the Environmental Protection Agency (EPA) meant to reduce fine particle matter (PM<sub>2.5</sub>) show the difficulty with calculation cost and benefit of them. The EPA during the drafting of the regulation predicted the reduction of PM<sub>2.5</sub> would reduce premature deaths. The problem with this prediction is that there is no actual known

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<sup>78</sup> Susan Dudley, "OMB's Reported Benefits of Regulations: Too Good to Be True?", *Regulatory Reform*, Summer (2013): 26-30.  
[https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs1866/f/downloads/Dudley\\_OMB\\_BC\\_Regulation-v36n2-4.pdf](https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs1866/f/downloads/Dudley_OMB_BC_Regulation-v36n2-4.pdf) (accessed March 21, 2021).

<sup>79</sup> Susan Dudley, "OMB's Reported Benefits of Regulations: Too Good to Be True?", *Regulatory Reform*, Summer (2013)

causation between PM<sub>2.5</sub> and premature deaths. Also, the OMB recognizes that there is no clearly accepted monetary value applicable for reducing mortality. The cost and benefit of the regulation that was enacted to protect citizens from premature death was based on estimates of factors that were not known to correlate directly with premature death. The estimated figure from that computation was then multiplied by the value that they assigned to reducing mortality. The final analysis that is based upon two arbitrary figures is then reported to Congress. Risk analysis experts question whether the EPA claims of benefit are real or significant.<sup>80</sup> Cox concluded with over 95 percent probability that there is no link between reducing PM<sub>2.5</sub> and premature death.

In 2012 the EPA enacted a regulation that was developed to limit the amount of mercury emitted from coal fired power plants. More than twenty years after the 1990 Clean Air Act, the EPA published regulations for the reduction of mercury and air toxins (MATS). The underlying beneficial implications as presented by the EPA were that the reduction of MATS would lead to overall health benefits for Americans and increase the Intelligence Quotient (IQ) points in children. It would do this by preventing neurological damage that was due to MATS exposure.<sup>81</sup> The EPA produced a regulatory impact assessment and fact sheet related to this proposed regulation. The cost of complying with this new policy would be an outstanding \$10 billion. According to the impact assessment from the EPA, the benefits gained by the regulation would a savings of \$90 billion, prevent 11,000 premature deaths annually, and improve the IQ of children exposed to MATS.

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<sup>80</sup> Louis Anthony Cox, "Reassessing the Human Benefits from Cleaner Air," *Risk Analysis* 32, no. 5 (2012): 816-829, doi: 10.1111/j.1539-6924.2011.01698.x (accessed Feb. 14, 2021).

<sup>81</sup> United States Environmental Protection Agency, "Mercury and Air Toxin Standards: Clean Power Plants," <https://www.epa.gov/mats/cleaner-power-plants>. (accessed April 15, 2021).

The EPA regulatory impact assessment showed that the average increase in IQ from implementing this regulation would be 0.00209 points for children exposed.<sup>82</sup> The EPA report also states that the primary source of exposure to mercury for people is known to come from eating fish that are exposed to mercury from the air that reaches the water source, not through MATS emitted from coal burning power plants.

George Washington Regulatory Studies Center (GWRSC) has conducted a wide variety of research and data collection that is related to federal agency policy making. One analysis conducted by GWRSC compared significant economic regulations that been issued by federal agencies under specific presidents. The data the center comparison was from the Clinton, G.W. Bush, and Obama administrations.<sup>83</sup> Analysis of this data shows that the number of regulations issued by the Department of Health and Human Services (HHS) increased from 21 percent during President Clinton's terms to 42 percent during President Bush's terms. Under President Obama, the number of regulations decreased slightly to 40 percent. The number of economically significant regulations issued by federal agencies under President Clinton's terms were 161. This number increased by 62 percent while President Obama was in office. The highest increase in federal regulation produced at this time was from the Department of Health and Human Services. This increase is the effect of The Patient Protection and Affordable Care Act (PPACA). The percentage of federal agency regulations drafted by the HHS under President Clinton and

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<sup>82</sup> Susan Dudley . "OMB's Reported Benefits of Regulations: Too Good to Be True?", *Regulatory Reform*, Summer (2013).

<sup>83</sup> George Washington Regulatory Study Center, "Comparing Regulatory Agendas Across Administrations: Economic Significant Rules Issued by Select Executive Agencies Under Presidents Clinton, Bush, and Obama." <https://regulatorystudies.columbia.gwu.edu/economically-significant-rules>. (accessed April 21, 2021).

President Obama were 21 percent and 40 percent, respectively. The data shows that the number of federal regulations enacted by the administrative state significantly increased over the span of these two presidencies. The EPA produced 73 new economically significant policies under President Clinton alone.<sup>84</sup> That correlates with 24 percent of all economically significant policies enacted during his presidency. EPA and HHS have held consistently at writing 45-55 percent of the overall economically significant rules over all three presidencies.

Another way to assess the impact of policies enacted by the administrative state is to look at the cost of developing and enforcing the regulations. In data gathered from the *Budget of the United States Government*, President Clintons administration budgetary cost of federal regulation expanded from close to \$24 billion to over \$31 billion during his presidency.<sup>85</sup> President Obama's. budgetary costs for federal regulation were initially calculated to be \$41 billion and climbed to \$49 billion during his presidency. A closer look at the data also shows a tremendous increase in budgetary expenditures required for agency staff and cost devoted to regulatory activity. This cost was calculated at \$24 billion at the start of President Clintons presidency and climbed to \$49 billion at the close of President Obama's last term. The biggest rise in cost of regulatory expenditures were seen in policies of social impact.<sup>86</sup> The percentage of budgetary monies spent on social

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<sup>84</sup> Brian Ryoo, "OMB Releases Draft of Annual Regulation's Impacts," *The Regulatory Review*, June 5, 2013.

<sup>85</sup> Weidenbaum Center, "Budgetary Costs of Federal Regulations, Adjusted for Inflation," *George Washington University Regulatory Studies Center*.

<sup>86</sup> Weidenbaum Center, "Budgetary Costs of Federal Regulations, Adjusted for Inflation," *George Washington University Regulatory Studies Center*.

policies is consistently 77-78 percent through all three presidents. Economic policy development and enforcement cost is 17-18 percent of the budgetary cost.

## Conclusion

The data shows that the federal administrative bureaucracy produces far more regulations than the legislative branch does. Federal agencies can produce up to eleven times more regulations than Congress produces through the legislative pathway. The regulations that are enacted by the federal bureaucracy carry the same weight as legislative statutes. The Judicial branch of the federal government has provided legitimacy of the administrative state through Supreme Court decisions such as *Chevron U.S.A. Inc v. Natural Resources Defense Council, Inc* (1984).<sup>87</sup> Seventy-seven percent of the regulations enacted by the federal administrative agencies are focused on social issues. Eighteen percent impact economic policy. The cost of agency staff and oversight of regulations perpetuated by the federal bureaucracy has been as high as \$49 billion annually. The impact including the cost of initiation and ongoing oversight can be staggering. Another concern about regulations drafted by the federal bureaucracy is the methodology used by the Office of Management and Budget to calculate the cost and benefit analysis of new regulations. The examples provided reveal a few shortcomings in the analysis methods in use. The examples also show that new regulations were enacted despite inaccuracies and misinformation in the federal agencies preliminary planning

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<sup>87</sup> Legal Information Institute. Cornell Law School. *Chevron, U.S.A., Inc. v Natural Resources Defense Council, Inc.* (1984). <https://www.law.cornell.edu/supremecourt/text/467/837> accessed May 10, 2021.

phase. Although the federal administrative regulations do have such a tremendous impact on social and economic policy it is difficult to trust the accuracy of the data utilized in the drafting process.

Special interest groups have multiple avenues through which they can influence new policy formation. Many of these groups spend millions of dollars in attempts to manipulate public policy. Special interest groups can convince politicians to exert power over federal administrative agencies to influence regulations. Another way to influence federal agencies that draft regulations is the data used by administrative bureaucrats to draft public policy may be provided by private companies with special interests. These are a few methods that special interest groups can influence public policy through the administrative state's regulatory process. One potential method that public policy may be influenced by the administrative state is through bureaucratic personal beliefs and bias.

If the saying, "history repeats itself" is accurate, it would be wise to reflect upon the struggles that led to the development of the administrative state, the shortcomings of the modern administrative state, and the present political atmosphere. Skowronek in his writings reviews the problems encountered early in the development of the administrative state including the struggle for power between the judicial branch and the political parties.<sup>88</sup> Society became much more complex after the industrialization of the United States and required a more structured administrative capacity. Skowronek's study uncovers three conditions in society that were necessary as a catalyst for change: crisis, class conflict, and societal complexity. At the end of the nineteenth century there was a

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<sup>88</sup> Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities 1877-1920*. (Cambridge: Cambridge Press, 1982).

crisis that led to the belief that a stronger administrative machine was needed. There was class conflict between the labor force and the wealthy capitalists. Lastly, America was changing to a more industrialized urban society. These three conditions surmounted and led to a slow but ultimately dramatic change in the federal administrative state to meet the needs of changing times. The political parties resisted change because they feared that change mean loss power.

In the modern administrative state, we can still see similar struggles. Crisis can be seen in the battle within political system between the conservatives, progressives, and the anarchists. Class conflict can be seen by politically motivated groups to divide the working class noted as the 99 percent against those labeled elites known as the One Percent. We can also see the class divide within the administrative state itself. The individuals in the administrative state that generate new regulations have a dim view of the intelligence of the American people. We saw that the bureaucrats do not have a clear picture of who the average American is. Societal complexity can be seen in multiple places. Modern American society is electronic technology driven. The information highway of the internet has created an electronic international network of awareness. Social media has created a world where there are no borders. The U.S. political system continues to fight the hegemony of party needs.

In the process of the demands placed upon the government, the courts, and the parties, the administrative state continues to grow. The old system of the 19<sup>th</sup> and into the 20<sup>th</sup> century has been molded into a professional federal bureaucracy. But what appeared as the solution, has become the problem. The federal administrative bureaucracy has little Congressional oversight, does not understand whom they represent all the while enacting



federal regulations that have the power and enforceability of legislative laws. It is on the edge of chaos that change takes place. Should reform take the form of more Congressional control over the administrative state or by dismantling it? Should a Constitutional amendment be proposed that accepts the administrative state as the fourth branch of government? A final question to reflect upon is, has the U.S. federal bureaucracy been able to adhere to constitutional principles? This question will be addressed in the next chapter.

### **Chapter 3**

#### **How Do Federal Agencies, Government Privatization, and Constitutional Principles Mix?**

Since the 1960's the administrative state has expanded at a significant rate. In 1960 the administration of President Kennedy employed 1.6 million federal employees.<sup>89</sup> By 2019 that number has grown to 9 million federal employees.<sup>90</sup> From 1960-2019 there are seven

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<sup>89</sup> George Will, "Big Government' is every growing, on the Sly," *National Review Politics & Policy*, February 25, 2017, accessed June 15, 2021.  
<https://www.nationalreview.com/2017/02/federal-government-growth-continues-while-federal-employee-numbers-hold/>

<sup>90</sup>Fiona Hill, "Public Service and the Federal Government," Brookings Institute, accessed June 10, 2021  
<https://www.brookings.edu/policy2020/votervital/public-service-and-the-federal-government/#:~:text=When%20all%20of%20these%20are,of%20156.92%20million%20in%202019.>

new Cabinet agencies. The U.S. population in 1960 was 180.7 million people.<sup>91</sup> The U.S. census numbers show that the population had grown to 328.2 million by 2019. Not only had the population grown, but services that were expected to be provided by the government had expanded. The administrative state now employs approximately 6% of the U.S. workforce.<sup>92</sup> The federal bureaucracy is responsible for national infrastructure, conservation of natural resources, promote educational excellence, and national security to name a few services. The administrative state encompasses 137 independent agencies with over 200 other federal agencies and commissions.<sup>93</sup> The services provided by these federal agencies can be very specialized. Discussions focused on outsourcing were initiated in the late 1980's. By the early 1990, the U.S. Federal government had embraced outsourcing federal services to private companies to improve efficiency, provide the necessary specialization, and decrease overall budgetary costs.<sup>94</sup> Federal dollars spent on outsourcing of temporary help services have increased from \$300 million in 2008 to over \$1.7 billion in 2018.<sup>95</sup> The Veterans Administration (VA), the Indian Health Services (HIS), the Department of Defense (DOD), the Bureau of Prisons, and the Federal Occupational Health clinics signed contracts in 2018 that tallied up over \$884 million alone. This occurred when the Trump administration chose to privatize previously

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<sup>91</sup> United States Census Bureau. *1960 Census of the Population: Supplementary Reports: Race of the Population of the United States by States, 1960*. Last modified September 7, 1961 accessed June 13, 2021. <https://www.census.gov/library/publications/1961/dec/pc-s1-10.html>

<sup>92</sup> Fiona Hill, "Public Service and the Federal Government," Brookings Institute, accessed June 10, 2021 <https://www.brookings.edu/policy2020/votervital/public-service-and-the-federal-government/#:~:text=When%20all%20of%20these%20are,of%20156.92%20million%20in%202019.>

<sup>93</sup> United States Government and Services, "A-Z Index of U.S. Government Departments and Agencies." Accessed June 13, 2021. <https://www.usa.gov/federal-agencies>.

<sup>94</sup> The Conference Board Research Report. *HR Outsourcing in Government Organizations*. P7-8 (2004). <https://www.govexec.com/pdfs/accenturetechStudy.pdf>

<sup>95</sup> Chris Swartz and Laura Padin. *"Temping Out the Federal Government," National Employment Law Project*. June 2019. P 1-4.

government provided healthcare. The federal agencies now spend hundreds of billions of dollars outsourcing items beyond services such as purchasing information technology and weapons systems from private sector companies.<sup>96</sup>

Although the number of federal civilian employees has only grown from 2.04 million in 2017 to 2.08 million in 2019, the number of federal outsourcing contracts has increased.<sup>97</sup> Federal government contract spending has increased for the last five years in a row. In 2020 government contract spending increased by \$83 billion in one year alone.<sup>98</sup> It was expected that \$682 billion would be spent in 2020 for federal outsourced contractors. This data entails only companies that hold unclassified contracts and have a direct relationship with the government. It does not include any subcontractors nor classified contracts. As the number of outsourced federal contracts expand the oversight capabilities of the federal agencies do not expand. How does outsourcing or privatizing of government responsibilities affect the checks and balance system of the U.S. democracy?

The federal agencies, also known as the administrative state, have been charged with the duty of conducting the business of the government. Federal agencies as part of the business of government are given the responsibility to develop specialized regulations by Congress. Federal agencies bring vague congressional statutes to life by writing federal regulations that embody the essence of what Congress intended in the statute handed to

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<sup>96</sup> Laura Peterson, "Outsourcing Government: Service contracting has risen dramatically in the last decade," *The Center for Public Integrity*. Last updated May 19, 2014, accessed June 8, 2021. <https://publicintegrity.org/national-security/outsourcing-government/>

<sup>97</sup> "Federal Workforce Statistics Sources: OPM and OMB", Congressional Research Service, Last updated Oct 23, 2020, Accessed June 10, 2021. P 4. <https://fas.org/sgp/crs/misc/R43590.pdf>

<sup>98</sup> Kevin Brancato, "BGOV200," *Federal Industry Leaders 2020*, Bloomberg Government. Accessed July 12, 2021. [https://assets.bbhub.io/bna/sites/3/2021/06/BGOV200\\_Federal-Industry-Leaders-2020.pdf](https://assets.bbhub.io/bna/sites/3/2021/06/BGOV200_Federal-Industry-Leaders-2020.pdf)

the agency. The federal agencies within the administration are also given charge of enforcing and oversight of the regulations they have written. There have been scholars who argue that this method of regulation development is unconstitutional and illegal.<sup>99</sup>

This paper will not engage in the debate of the constitutionality of the federal bureaucracy. Instead, it will look at the history of federal outsourcing, its expansion and how outsourcing and privatization of federal agency responsibilities are woven into daily life. The paper will look at how privatization of federal duties intersects with the standards of the U.S. democracy such of transparency, integrity, accountability.

The services and products that the modern federal bureaucracy is expected to deliver is almost limitless. The federal governments responsibilities have expanded from securing fair interstate commerce regulations in the 1880's to deciding if the Florida key deer is listed as an endangered species on Big Pine Key, Florida in 1967.<sup>100 101</sup> With such a vast expansive list of regulations, how does the federal government oversee the accuracy of the regulations written by administrative bureaucrats? Then, when the regulations are implemented, how is oversight of the new rules achieved? These questions are answered by understanding there are processes that are utilized within the government structure.

Congress signed into law the Administrative Procedure Act (APA) in 1947 that outlines how federal agencies develop regulations and ultimately publish them in the Federal Registry. Congress can delegate it authority of rulemaking to federal agencies.

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<sup>99</sup> Philip Hamburger, *Is Administrative Law Unconstitutional?* (Chicago: University of Chicago Press, 2014) 65-80.

<sup>100</sup> "We the People in Order to Form a More Perfect Union," A National Initiative on American History, Civics, and Service, accessed June 20, 2021. <https://www.ourdocuments.gov/>

<sup>101</sup> National Wildlife Federation. <https://www.nwf.org/Educational-Resources/Wildlife-Guide/Mammals/Key-Deer> accessed June 20, 2021.

These regulations carry the force of the law. In *National Latino Media Coalition v. Federal Communications Commission* (1987), “A valid legislative rule is binding upon all persons, and on the courts, to the same extent as a congressional statute. When Congress delegates rulemaking authority to an agency, and the agency adopts legislative rules, the agency stands in the place of Congress and makes law.”<sup>102</sup> Although Congress can delegate rulemaking authority, it retains the power to repeal the regulation the agency has written. Congress also retains the power for oversight of regulations. It is through 1) review of newly produced regulations by Congress and the public, then 2) oversight of federal agency implementation of regulations, that the democratic process can be maintained.

Once Congress has authorized an agency to promulgate a rule, the APA requires the agency to publish a notice of intent to promulgate a rule. This notice is published in the Federal Register. In this process, persons or organizations that have an interest in the rule being proposed can comment. The comment section of the APA process is the method by which the general public can have a say in how they are governed. The agency has a responsibility to review the public comments and address the concerns of citizens. At the completion of this step in the process, the agency can publish the new rule with a statement of purpose in the Federal Register.<sup>103</sup> Rules that are interpretive in nature or rules that are related to agency personnel only do not have to go through the rigors of public notice and comments. Also, if a new rule does not need to go through the notice and comment

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<sup>102</sup> Cass Sunstein. *Trump White House Seeks New Power Over Agencies*. Politics & Policy, April 23, 2019, accessed June 21, 2021. <https://www.bloomberg.com/opinion/articles/2019-04-23/trump-seeks-more-control-of-fed-sec-and-other-agencies>.

<sup>103</sup> Ibid

process if it is deemed impracticable or contrary to general public interest. Newly promulgated agency rules must then be reviewed by the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA). There are two conditions to this step of the review process. First, independent federal agencies do not have to submit new rules to OIRA. Secondly, for all other federal agencies, only 'significant' rules must be submitted to OIRA for review. OIRA then assesses the new rule for its consistency with the present administration's overall goals. At this point in the process the public and the executive branch have had the opportunity to review the newly promulgated rule.

Congressional oversight is necessary to ensure that the agency has acted as the legislation had intended. If the rule is not what Congress had intended, it can be overturned by using the Congressional Review Act (CRA).<sup>104</sup> The CRA was passed in 1996 so that Congress to have better oversight of the regulation development. It can also be utilized by members of Congress to draw attention to a rule and make public their disapproval of it. Since the passing of the CRA, Congress has utilized it as a method of overturning a federal agency regulation seventeen times.<sup>105</sup> The first time this method of overturning a regulation was during 2001-2002 107<sup>th</sup> Congress. The other sixteen times that Congress overturned newly drafted agency rules was during the 115<sup>th</sup> Congress during 2017-2018 session. During the 115<sup>th</sup> Congress, the Republican party controlled both houses and President Trump was in control of the executive branch.

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<sup>104</sup> Congressional Research Service CRS Report R43992, "The Congressional Review Act (CRA): Frequently Asked Questions," accessed June 15, 2021.

<https://crsreports.congress.gov/product/details?prodcode=R43992>

<sup>105</sup> Ibid.

In April 2019, the acting director of Office of Management and Budget (OMB) sent out a memorandum to all executive agencies and departments.<sup>106</sup> This memorandum now requires independent agencies to give notice of pending new rules to OIRA so they can decide if they are major rules and review cost-benefit analysis provided. Before this memorandum, it was not required that independent agencies inform OIRA of new rules. There are concerns that this new process by which OIRA becomes the gatekeeper for pending regulations that given it more control that it did not previously have.<sup>107</sup> The first hypothetical concerns are that OIRA might cause delays in the process of newly submitted regulations. Second, there is concern that OIRA could potentially dispute figures that were submitted with cost-benefit analysis of an agency. Theoretically, these stumbling blocks might be methods for a president to exert control through the OMB and OIRA on all federal agencies.

### **The Intersection of Outsourcing and Rulemaking**

As reviewed in the previous section the rulemaking process through federal agencies with congressional authorization can be very cumbersome. But every year thousands of new federal regulations are enacted by the administrative state. How can federal agencies keep up with the enforcement of the plethora of new regulations? If Congress gives a federal agency authority to develop and enforce new regulations, does this mean that the authority can be transferred to private companies? One reason that it has been accepted

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<sup>106</sup>Russell T. Vought, "Guidance on Compliance with the Congressional Review Act," Office of Management and Budget. M-19-14 last updated April 11, 2019, accessed June 22, 2021. <https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-14.pdf>

<sup>107</sup> Cass Sunstein. *Trump White House Seeks New Power Over Agencies*. Politics & Policy, April 23, 2019, . Accessed June 21, 2021. <https://www.bloomberg.com/opinion/articles/2019-04-23/trump-seeks-more-control-of-fed-sec-and-other-agencies>.

that Congress can request agency help in writing rules is because they are supposed to possess specialization in specific areas that Congress may not have.<sup>108</sup> What happens when a federal agency is unable to ensure oversight of its regulations? This can happen as a result of budget cuts or understaffing.

### **Privatizing Public Rulemaking and Oversight to Private Organizations**

The Center for Medicare and Medicaid Services (CMS) which is an agency within the Department of Health and Human Services (HHS) has developed a list of regulations and quality standards that U.S. healthcare facilities must meet to receive federal Medicare and Medicaid monies. To ensure these standards are met, CMS is expected to inspect facilities on a regular basis. CMS does not have the resources to inspect the tens of thousands of healthcare facilities. The types of facilities that must be certified that they comply with CMS developed regulations include but not limited to hospitals, outpatient surgical centers, dialysis centers, nursing homes, and hospice settings. These health care organizations must be certified that they comply with Conditions of Participation (CoPs) or Conditions of Coverage (CoCs) which are minimum requirements for health and safety of the facilities.

CMS has outsourced the certification process to either a state agency that acts on behalf of the federal government or through private accrediting organizations that have been “deemed” to have the that meet or exceed those of CMS. The CMS defines deeming authority as: “The authority granted by CMS to accrediting organizations to determine, on CMS's behalf, whether a M+CO evaluated by the accrediting organization is in

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<sup>108</sup> Ibid



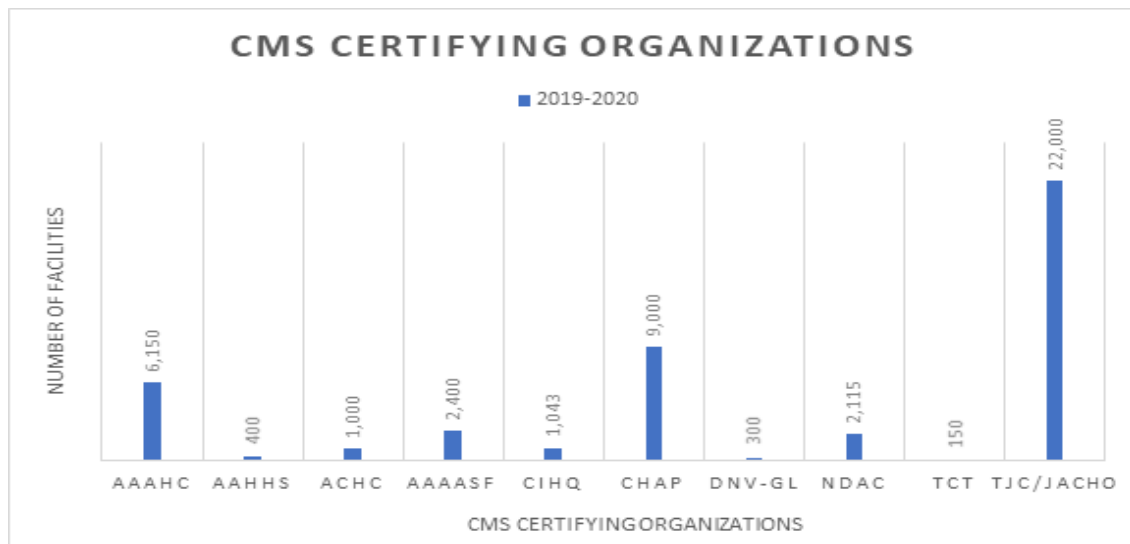
compliance with corresponding Medicare regulations.<sup>109</sup> M+CO is” any private or public entity licensed by a State as a risk-bearing entity that is certified by CMS.”<sup>110</sup> Addendum 1 provides a copy of the application requirements checklist that is requested by CMS for the Deeming process.

Center for Medicare and Medicaid Services now “deems” ten companies with the responsibility of assuring health care facilities meet Medicare standards. The companies are the Accreditation Association for Ambulatory Health Care (AAAHC), the Accreditation Association for Hospitals and Health Systems (AAHHS), the Accreditation Commission for Healthcare, Inc (ACHC), the American Association for Accreditation of Ambulatory Surgery Facilities (AAAASF), the Center for Improvement in Healthcare Quality (CIHQ), the Community Health Accreditation Partner (CHAP), DNV GL-Healthcare (DNVGL), the National Dialysis Accreditation Commission (NDAC), the Compliance Team (TCT), and the Joint Commission (TJC). CMS has given each of these organizations the responsibility to oversee that the regulations enacted by them are being followed. Table 1 shows each organization and how many facilities they are responsible for oversight of federal regulations in the healthcare arena. Without certification by the appropriate private organization, health care facilities cannot receive federal Medicare monies.

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<sup>109</sup> United States CMS, “glossary,” <https://www.cms.gov/apps/glossary/default.asp?Letter=D&Language>

<sup>110</sup> Ibid



**Figure 4**

*Source: www.cms.gov. Data as of July 3, 2021*

The Joint Commission (TJC) is the largest of these private organizations. As noted in the above table, TJC certifies over 22,000 facilities as an organization ‘deemed’ by CMS. This warrants a closer look at TJC and its practices. The Joint Commission is a not-for-profit organization that is managed by a board of 21 members. The members are physicians, administrators, nurses, quality experts, educators, and a consumer advocate.<sup>111</sup> None of the members are specifically required to be employed by CMS or the federal bureaucracy. There is also an international branch of the Joint Commission that accredits facilities internationally. The Joint Commission states that they, “interface with the federal government and other stakeholders on key legislative, regulatory, and public policy issues.”<sup>112</sup> TJC says that the standards are always evolving with input from the Board of Commissioner. The organizations have been ‘deemed’ qualified to provide

<sup>111</sup> The Joint Commission website accessed June 26, 2021. <https://www.jointcommission.org/>

<sup>112</sup> Ibid

oversight of the CMS regulations meet or exceed CMS standards. So, TJC as a private organization can have standards that exceed CMS standards and impose these on health care facilities. If a health care facility does not comply with the regulations enacted by CMS and any additional regulations that any of the ten accreditation organizations may also enforce, federal Medicare reimbursement money will be withheld. CMS has outsourced its congressionally delegated responsibility of enforcing federal regulations to private organizations that can cripple a health care facility by withholding accreditation.

Another area of concern with CMS delegating its governmental responsibility to accreditation organizations is oversight. CMS allows organizations such as TJC to oversee federal regulations are being followed. But how is CMS overseeing that accrediting organizations are properly doing their job? The oversight mechanism for this specific outsourcing is that CMS reserves the right to randomly audit an accredited facility. The ten accrediting organizations certify approximately 43,000 facilities nationwide. That would require a tremendous number of random audits for a federal agency that does not have the resources to do the accreditation process in house.

### **Privatizing National Security**

Many would agree that outsourcing of supplies and custodial services do not produce any consequence to democracy in the United States. Outsourcing contracts many times is a very valuable tool for the federal government. Outsourcing has allowed the federal government to gain specialization in some areas that would otherwise be too expensive to obtain. Without outsourcing short term contracts can be arranged and hiring federal employees can be time consuming. These are just a few of the benefits of outsourcing.

Does that same mindset hold true when services that are typically viewed as governmental in nature? The management of outsourcing contracts and the services provided by private companies once the agreement has been signed is a different story. Agency bureaucrats have processes and procedures in place to manage federal employees. Private companies that have contracts for an outsourced service manage their own employees. The agency bureaucrats have very limited exercise over private company employees.<sup>113</sup> Federal contracts for outsourcing of services can be seen in the federal prison system, private contractors to help fight wars, and companies to help rebuild war torn countries. Outsourcing of services have expanded to disaster relief, national security, and the intelligence community. These government services are much different than a company securing a federal contract to provide printer paper to the White House.

Concerns of national security can arise with outsourced contracts to companies that provide services for the U.S. intelligence community. Booz Allen Hamilton held the federal contract with the National Security Agency (NSA). The NSA mission focuses on the cybersecurity of the United States.<sup>114</sup> The Central Intelligence Agency (CIA) held a contract with Booz Allen Hamilton and employed Edward Snowden.<sup>115</sup> Booz Allen Hamilton is one of the federal government's largest contractors with over \$4 billion in federal contracts alone. In 2013, Edward Snowden revealed national secrets that he had gained access to while a subcontractor. Despite this breach of national security by an

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<sup>113</sup> Jody Freeman and Martha Minow, *Government by Contract: Outsourcing and American Democracy*. (Cambridge: Harvard University Press, 2009) 1-20.

<sup>114</sup> National Security Agency Central Security Services, "Defending Our Nation: Securing Our Future," accessed June 27, 2021. [Nas.gov/about/mission-values/](https://www.nsa.gov/about/mission-values/)

<sup>115</sup> Danielle Kurtzelben, "Edward Snowden NSA Leaks Won't Likely Hurt Booz Allen Business," *U.S. News*, June 11, 2013, accessed June 16, 2021. <https://www.usnews.com/news/articles/2013/06/11/edward-snowden-nsa-leak-wont-likely-hurt-booz-allen-business>

outsourced service provided by a federal contractor, Booz Allen Hamilton continues to gain federal contracts that tally in the billions. Recent federal contracts came from the U.S. Air Force in the sum of \$950 million for one contract.<sup>116</sup> The breach of national secrets does not seem to have deterred the federal government from awarding more contracts to the same company. This alone should be of concern about the national safety of the U.S. democracy in the hands of private contractors.

### **Constitutional Principles and Private Prison Companies**

Other concerns that have been raised as more government services are outsourced is conflict of interest. Can private contractors that provide a service for the federal government influence government decisions that could provide them with means for growth? In an ideal world, the answer would be no. But, in the dysfunctional world of federal contracts for outsourced services, the answer is yes. In 1983, the U.S. government started to outsource its prison services to private prison companies.<sup>117</sup> The business of prisoners has become quite prosperous. The correctional facility industry now reaches \$5.1 billion annually as of 2020.<sup>118</sup> This industry is influenced by the number of individuals incarcerated. The number incarcerated can be directly influenced by politicians and federal bureaucrats that make rules.

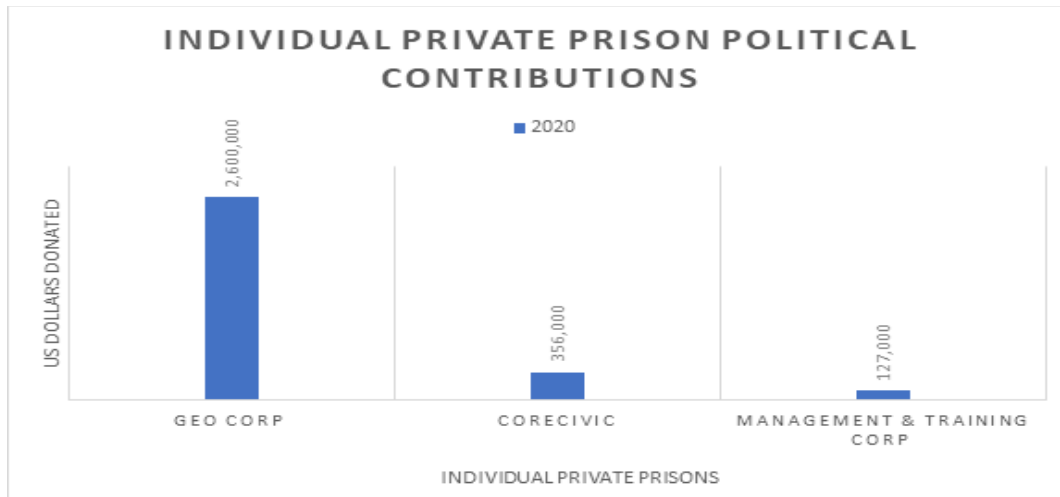
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<sup>116</sup> Ashley Howard, "U.S. Airforce Awards Booz Allen \$950 Million IDIQ Contract," August 31, 2020. Accessed June 9, 2021. <https://www.boozallen.com/e/media/press-release/q2-2021/us-air-force-awards-booz-allen-950m-idiq-contract.htm>

<sup>117</sup> U.S. Department of Justice, Bureau of Justice Assistance, "Emerging Issues on Privatized Prisons," February 2001, accessed June 27, 2021. <https://www.ojp.gov/pdffiles1/bja/181249.pdf>

<sup>118</sup> Industry Research Reports United States, "Correctional Facilities Industry in the U.S.-Market Research Report," Nov 24, 2020, accessed June 23, 2021. <https://www.ibisworld.com>

**Figure 5**



Source: [www.prisonlegalnews.org](http://www.prisonlegalnews.org).

The largest companies in the private corrections facility industry in the United States are Corecivic Inc, the GEO Group Inc, and Management and Training Corp. Corecivic was previously names Corrections Corp of America. Corrections Corp of America diversified the company into building jails, maintaining them, as well as guarding prisoner. With this diversification came a new name, Corecivic Inc.<sup>119</sup> Following the money, it can be quickly revealed that these private corrections firms have deep pockets when it comes to the political area. Geo Group, Corecivic Inc, and Management and Training Corp donated over \$3.1 million in political contributions in 2020.<sup>120</sup> Figure 5 shows the political contributions from the top three for profit prison companies. They

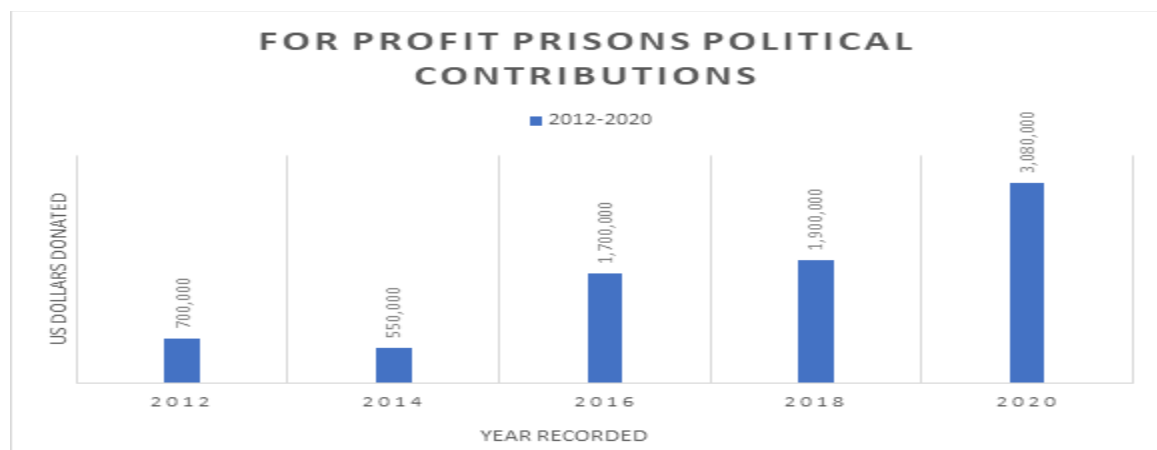
<sup>119</sup> Devlin Barrett, "Private Prison Firm CCA to Rename Itself Corecivic," *Wall Street Journal Business*. Oct. 28, 2016, accessed June 22, 2021. <https://www.wsj.com/articles/private-prison-firm-cca-to-rename-itself-corecivic-1477666800>

<sup>120</sup> Center for Responsive Politics, "For-Profit Prisons," accessed June 12, 2021. <http://opensecrets.com>

spent over \$4.5 million for lobbying in 2020. Dividing the total donations of 2020 from profit prison to political campaigns the data shows that approximately ten percent of the donations went to democrat candidates, leaving approximately ninety percent to republican candidates.

Since the federal and state government are their only customer, the for-profit prison companies use part of their billions of revenues to influence government officials and politicians. The political contributions made a tremendous jump from 2014 to 2016 as the stakes got higher.<sup>121</sup> Figure 6 shows the increase in political contributions by for profit corrections companies.

**Figure 6**



Source: [www.opensecrets.org](http://www.opensecrets.org). Accessed

The increase in both political contributions and lobbying monies were a result of then President Obama's decision to not renew contracts with for-profit prisons. Presidential candidate Donald Trump had promised to renew federal contracts with private prison

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<sup>121</sup> Ibid

companies (PPC).<sup>122</sup> Political contributions from PPC's jumped from approximately \$600 thousand in 2014 to over \$1.7 million in 2016. Much of these contributions went to political action committees (PAC). The battle over PPC's is not a new one. A report written in 2011 showed how PPC's used their large political contributions and employed hundreds of lobbyists to influence politicians to promote legislation that would keep their beds full.<sup>123</sup> The political contributions by PPC's for the 2020 election year hit a all-time high of \$3.1 million. Geo Group and Corecivic were the two largest donors.

Geo Group has a board of directors consisting of nine individuals. Three of the individuals on the Geo Group Board of Directors have previous employment with either the federal government or a state government.<sup>124</sup> The Board of Directors of Corecivic also is comprised of nine individuals.<sup>125</sup> Five of the nine Board of Directors of Corecivic were previously employed with the federal government in their prior careers. Board member Stacia Hylton a prior Director of U.S. Marshall Service under President Obama. She had also held other federal appointments. She was appointed to Board of Directors of Corecivic in August of 2016. In that same month President Obama awarded Corecivic a \$1 billion no bid contract to detain asylum seekers that had come from Central America.<sup>126</sup> After the contract had been signed, a judge ruled the action of detaining asylum seekers

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<sup>122</sup> Karl Evers-Hillstrom, "For-Profit Prisons Strongly Approve of Bipartisan Criminal Justice Reform Bill," accessed June 18, 2021. <https://www.opensecrets.org/news/2018/12/for-profit-prisons-approve-of-bipartisan-criminal-justice-reform/>

<sup>123</sup> "Gaming the System: How the Political Strategies of Private Prison Companies Promote Ineffective Incarceration Policies," Justice Policy Institute, October 2011, accessed June 8, 2021.

<sup>124</sup> Geo Group web page. <https://www.geogroup.com/> accessed June 28, 2021.

<sup>125</sup> Corecivic: Better the Public Good. Website. <https://www.corecivic.com/investors/board-of-directors>

<sup>126</sup> Eric Levitz, "The Obama Administration's \$1 Billion Giveaway to the Private Prison Industry," *Intelligencer*, Aug 15, 2016, accessed June 28, 2021. <https://nymag.com/intelligencer/2016/08/obamas-usd1-billion-giveaway-to-the-private-prison-industry.html>



was illegal. But the contract with Corecivic had already been signed. They received large monthly sums but were not able to legally provide the service they had contracted to do.

The process of political donations and lobbying brings about concerns of conflict of interest. Despite laws prohibiting federal contractors from making political contributions, it persists. The federal contractors that provide outsourced services continue to seek methods to financially promote specific candidates or policies that will help expand their business interest. The Campaign Legal Center (CLC) has been an activist organization to report federal contractors that they find have violated the campaign finance laws.<sup>127</sup> CLC alone reported multiple federal contractor campaign finance violations to the Federal Election Commission (FEC). In 2020 the FEC announced that a Naval Contractor was fined for violating federal campaign finance laws.<sup>128</sup> The Congressional Leadership Fund, a Republican Political Action Committee (PAC) accepted a donation from a federal naval contractor. This in direct violation of FEC rules. These types of campaign violations are not nearly as clear when larger corporations give to a PAC or to a candidate from a subsidiary company that they may have a relationship with.

Turning the focus in the direction of oversight of government agencies, a report written for the National Institute of Justice found that oversight of the PPCs by the Federal Bureau of Prisons (FBoP) was inconsistent at a minimum.<sup>129</sup> The PPCs are expected by their

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<sup>127</sup> Sophia Gonsalves-Brown, "Federal Contractors Continue to Ignore Contribution Ban and Donate to Super PACs," Campaign Legal Center, Oct 28, 2020.

<sup>128</sup> Kenneth P. Doyle, "Navy Contractor Fined in Rare Campaign Finance Enforcement Case," Bloomberg Government, Aug. 6, 2020, accessed June 25, 2021. <https://about.bgov.com/news/navy-contractor-fined-in-rare-campaign-finance-enforcement-case/>

<sup>129</sup> Donald McDonald, PhD and Carl Patten, Jr., Esq., "Governments' *Management of Private Prisons*," (Cambridge: Abt Associates Inc, 2013). <https://www.ojp.gov/pdffiles1/nij/grants/203968.pdf>

contracts to operate their facilities by the same standards that a public facility would. The standards are set by the American Correctional Association (ACA).<sup>130</sup> The report written by the National Institute of Justice found that the ACA standards are a dichotomy.<sup>131</sup> The ACA standards are focused on procedures. The standards are not in place to evaluate the outcomes of the procedures. The report noted that two different facilities can be compliant to ACA standards, but the outcome of each of those prisons function may vary tremendously. This report also found out that “government practices of monitoring privately operated facilities vary widely.”<sup>132</sup> In facilities that were contracted by states, 48% had full time contract monitors. This is compared to less than ten percent of federally contracted private run prisons having full time contract monitors. This leaves a private company wielding the responsibility of a federal agency that has little oversight. The political checks and balance system as it applies here is very inconsistent. And at the political methods utilized as means to perpetuate its growth are a direct conflict of interest. Another concern with privatization of government services is transparency. Most federal government agencies have the legal responsibility of transparency. Unfortunately, private contractors for the federal government do not have to comply with the Freedom of Information Act (FoIA) that was signed in 1966. This leaves the public in the dark about the company, procedures, employees, and how the taxpayers’ money is being spent.

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<sup>130</sup> American Correctional Association, “Standards and Accreditation,” accessed June 23, 2021. [https://www.aca.org/ACA\\_Prod\\_IMIS/ACA\\_Member/Standards\\_Accreditation](https://www.aca.org/ACA_Prod_IMIS/ACA_Member/Standards_Accreditation).

<sup>131</sup> Donald McDonald, PhD and Carl Patten, Jr., Esq., “Governments’ *Management of Private Prisons*,” (Cambridge: Abt Associates Inc, 2013). 27.

<sup>132</sup> Ibid, ix

## Private Military Support

The democratic process in the United States encompasses specific characteristics that allow it to remain democratic in nature. The people rule themselves to some degree through elected representatives. Transparency of the government is a fundamental principle in democracy. In the checks and balance of the United States, one of the responsibilities of Congress is the oversight of federal agency spending and performance. How does this process unfold when government defense contractors are hired? The government-controlled defense was developed when the nation- state concept developed. Prior to that armies were privately organized.<sup>133</sup> The notion that the government has the monopoly on the use of force and defense was interspersed with the growth of the nation- state concept.<sup>134</sup> In more recent times the outsourcing of defense services, equipment, and technology has become common. In 2008 during Operation Iraqi Freedom, there were approximately 147,000 U.S. Armed Forces deployed to Iraq. During this same period there were approximately 150,000 Department of Defense (DOD) contractors in the same region.

A report completed by the Government Accountability Office (GAO) there were specific concerns that related to Congressional oversight<sup>135</sup>. There were nine specific concerns with the operation. GAO had two specific issues related to DOD contractors:”

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<sup>133</sup> Thomas Adams, *“The New Mercenaries and the Privatization of Conflict,”* Parameters, (Summer) 103-116.

<sup>134</sup> Deborah Avant, *“The Market for Force: Exploring the Privatization of Military Services,”* (Washington, DC: George Washington University, May 2000).

<sup>135</sup> United State Government Accountability Office, *“Operation Iraqi Freedom: Actions Needed to Enhance DOD Planning for Reposturing of U.S. Forces from Iraq,”* Report to Congressional Committees. Sept 2008, accessed June 12, 2021. <https://www.gao.gov/assets/gao-08-930.pdf>

(1) guidance and plans for the reposturing of contractors from Iraq; (2) accountability and disposition of contractor-managed government-owned property.” GAO also stated, “We believe that without more specific reporting from DOD, Congress may not be able to effectively exercise its oversight responsibilities.” The reposturing would include the coordination of private contractors, withdrawing 173,00 pieces of equipment worth \$16.5 billion, and closing of 311 installations that had been in use for over 5 years. This was to be accomplished while GAO had concerns there was lack of Congressional oversight.<sup>136</sup>

The Department of Defense (DOD) is the federal agency that has the largest number of outsourced private contractors.<sup>137</sup> The budget of DOD alone was \$404.5 billion in 2019.<sup>138</sup> It increased by more than 10% in 2020 to \$445.5 billion. In 2019 the total budget for defense related spending alone was \$676 billion. Nearly half of the total defense budget was for Pentagon related defense contracting, \$370 billion. The number of defense contractors in the Middle East were down from 2008 to 53,000 U.S. contractors and 35,000 U.S. military troops in 2019<sup>139</sup>. Although the number of U.S. military contractors has decreased the process of Congressional oversight remains in disarray.

Despite the massive budget of the DOD, the world of defense contracting has been riddled with scandals of fraud, abusive treatment of prisoners, and killing of innocent

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<sup>136</sup> Ibid

<sup>137</sup> Anne R. Markusen, “*The Case Against Privatizing National Security*,” *Governance*, 16:4, (October 2003). P474-475.

<sup>138</sup> Heidi Peltier, “*The Growth of the “Camo Economy” and the Commercialization of the Post-9/11 Wars*,” A Cost of War Research Series, Brown University. June 30, 2020. Accessed June 13, 2021. <https://watson.brown.edu/costsofwar/papers/2020/growth-camo-economy-and-commercialization-post-911-wars-0>

<sup>139</sup> United State Government Accountability Office, “Operation Iraqi Freedom: Actions Needed to Enhance DOD Planning for Reposturing of U.S. Forces from Iraq,” Report to Congressional Committees. Sept 2008 accessed June 12, 2021. <https://www.gao.gov/assets/gao-08-930.pdf>

civilians.<sup>140</sup> There is no clear process of oversight of federal contractors that are acting as an extension of the U.S. military. Congress has the authority to have individuals or specific industry executive answer questions under oath. This can be a cumbersome and somewhat unrealistic process of oversight with up to 150,000 individual contractors to oversee.

The prosecution of security guards that worked for Blackwater, USA in 2014 was a rare case in which a federal defense contractor was held accountable for actions while employed for private defense company. The incident took place at Nisur Square in Baghdad where 14 innocent civilians were shot by private defense contractors employed by Blackwater, USA.<sup>141</sup> Private military contractors had been called “untouchables” with no process in place for accountability for crimes committed while private contractors.<sup>142</sup> Blackwater U.S.A. has been fined over \$50 million for misconduct.<sup>143</sup> In 2010, Blackwater U.S.A. was fined\$ 42 million for “firearms violations-State Department Settlement”. Again in 2012 they were fined \$7.5 million for “firearms violations-deferred prosecution agreement”.

Blackwater U.S.A. has changed its name after 2007 scandal with Nasir Square incident. The new company is now part of Constellis Group. Constellis Group was awarded the

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<sup>140</sup> " Department of Homeland Security: Improved Assessment and Oversight Needed to Manage Risk of Contracting for Selected Services," Government Accountability Office, Sept 2008, accessed June 24, 2021. <https://www.gao.gov/products/gao-07-990>

<sup>141</sup> Department of Justice, "Former Blackwater Employee Sentenced to Life Imprisonment for Murder in 2007 Shooting at Nisur Square in Iraq," U.S. Attorney's Office, August 14, 2019, accessed July 3, 2021. <https://www.justice.gov/usao-dc/pr/former-blackwater-employee-sentenced-life-imprisonment-murder-2007-shooting-nisur-square>.

<sup>142</sup> Katherin Chapman, "The Untouchables: Private Military Contractors' Criminal Accountability under the UCMJ," *Vanderbilt Law Review* 63:4 (May 2010).

<sup>143</sup> "Federal Contractor Misconduct Oversight," Project on Government Oversight, accessed July 4, 2021. <https://www.contractormisconduct.org/contractors/38/lockheed-martin>

Department of State Global Protective Services contract worth \$3.7 billion in 2016.<sup>144</sup> The DOD's use of private military contractors is widespread and a longstanding policy, but it lacks transparency, oversight, and accountability which are cornerstones to the U.S. democratic process.

In 2019, the DoD announced that the agency had implemented new procedures to try to reign in any chances of fraud from federal contractors.<sup>145</sup> Shortly after the announcement a company that had signed a federal contract to provide spare parts to the DoD was prosecuted for false claims, defrauding the DoD, and tax evasion.<sup>146</sup> The business owner not only had misrepresented his companies' ability to provide the exact parts needed, he also coordinated efforts for other family members to start companies with the purpose of defrauding the federal government by gaining federal contracts. The parts that the business owner lied about were needed for military fighter jets and helicopters. He was sentenced to 36 months in prison (likely run by a PPC) and \$1.1 million fine.

Over the last 30 years, the DoD has used defense contractors to support the U.S. troops. The support of the defense contractors can be from large corporations that provide military planes and equipment to individuals that are contracted for private military support. Over 8,000 private military contractors have died supporting U.S. troops in the Middle East

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<sup>144</sup> "State Department Choses 7 New Worldwide Protective Services Contracts," Govconwire, March 4, 2016, accessed July 4, 2021. <https://www.govconwire.com/2016/03/state-dept-chooses-7-for-new-worldwide-protective-services-contract/>

<sup>145</sup> Jerad Serbu, "Pentagon Hunting for Other Instances of Price Gouging in Wake of Damning Spare Parts Audit," *Federal News Network*. May 16, 2019, accessed July 3, 2021. <https://federalnewsnetwork.com/defense-main/2019/05/pentagon-hunting-for-other-instances-of-price-gouging-in-wake-of-damning-spare-parts-audit/>

<sup>146</sup> United States Department of Justice, "Defense Contractor Sentenced to Three Years in Prison for Conspiracy to Defraud the U.S. Department of Defense, Conspiracy to Violate Arms Export Control Act, and Income Tax Evasion," *Justice News*, September 5, 2019.

since 2001. The top companies under federal contract that provide equipment, electronics, and defense systems are Lockheed Martin, Boeing Company, Raytheon Company, General Dynamics Corporation, and Northrop Grumman Corp. Lockheed Martin alone has had 91 instances of misconduct while under federal contract.<sup>147</sup> In August of 2007, Lockheed Martin was fined \$265 million for “self-reported F 35 overbilling.” In 2006 they were fined \$27,000.00 for federal election law violations. In 2015, Lockheed Martin was fined \$4.79 million for “using federal funds for lobbying.”<sup>148</sup> In 2000 they were fined \$13 million for “space launch information transferred to China (Arms Export Act Violation)”<sup>149</sup> The list for Lockheed Martin goes on and on. Most recent violation is in 2020 and the penalty is still pending. Boeing Company has 83 instances of misconduct since 1995. Those violations range from breaking federal law by using Russian titanium to a \$54 million fine for delivering defective Chinook Helicopters.<sup>150</sup>

But they and other many other companies continue to gain federal contracts for the DoD and other agencies despite these offenses that are available publicly. The Congressional oversight and agency oversight appears to be nonexistent. How does this happen? Political Action Committees (PAC) and individuals associated with the defense sector donated more than \$27 million to political candidates.<sup>151</sup> The money given to PACs supported more republicans than democrats. Lockheed Martin despite being fined at least

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<sup>147</sup> “Federal Contractor Misconduct Oversight,” Project on Government Oversight, accessed July 4, 2021. <https://www.contractormisconduct.org/contractors/38/lockheed-martin>

<sup>148</sup> Ibid

<sup>149</sup> Ibid

<sup>150</sup> “Federal Contractor Misconduct Oversight,” Project on Government Oversight, accessed July 4, 2021. <https://www.contractormisconduct.org/contractors/38/lockheed-martin>

<sup>151</sup> Open Secrets Center for Responsive Politics, “Defense Spending,” accessed July 3, 2021. <https://www.opensecrets.org/industries/contrib>

twice for violations of the U.S. political system continued to donate in the 2019-2020 election cycle to the sum of \$6.02 million. The defense industry put \$102 million of their money into lobbying in 2020.

Despite any potential attempts to control federally awarded contracts, there is legislation that outlines how federal contractors are to be evaluated. The evaluating and recording process is utilized in the process of awarding federal contracts. Federal law requires annual evaluations of contractors.<sup>152</sup> The government data base known as Past Performance Information Retrieval System (PPIRS) and Federal Awardee Performance and Integrity Information System (FAPIIS) store data from agency evaluations of federal contractors. The evaluations address the quality of product provided, compliance with schedules, conduct of management, and efforts to control costs. This annual evaluation process is to be done with federal contracts that are valued at \$150,000 or more.

## **Conclusion**

The purpose of this paper was to look at how federal agencies outsource government functions and how that intersects with U.S. democracy core principles of government transparency, integrity, and accountability. Transparency is a fundamental principle of the U.S. democracy. It allows private citizens the right to view how the federal government is spending money and the outcomes of that spending. That right has been solidified through the Freedom of Information Act (FoIA) of 1966. When agencies outsource to private companies the FoIA does not apply. Citizens in turn are denied access

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<sup>152</sup> Congressional Research Service. *Evaluating the "Past Performance" of Federal Contractors: Legal Requirements and Issues*. February 15, 2015.



to records and outcomes produced by the private companies. Through a search of the internet inquisitive citizens can find which companies were given federal contract monies, but there is no path to find out how that taxpayer money has been utilized by a private company. Nor do citizens have access to the outcomes produced using the taxpayer dollars that federal contracted companies spent. This lack of transparency can lead to poor oversight and loss of integrity of services. Although citizens may not have direct access to how federal contractors are spending taxpayer money, Congress has provided legislation that specifically outlines how and when federal agencies are required to evaluate the performance of contractors. This information in turn can be utilized by agencies in the bid process for choosing federal contractors.

When inquiring with CMS (Center for Medicare and Medicaid Services) about how many TJC (The Joint Commission) facilities were audited in 2020, a void can be found. TJC via email and telephone conversation states that they do not have that information to share with the public. CMS via email and multiple telephone conversations state that the agency is not aware of that data and suggested contacting TJC. So, TJC is not legally responsible to be transparent to citizens and the agency that is responsible for overseeing TJC does not have the data. They and other certifying organizations can set rules more restricting than CMS for certification without those rules being viewed by Congress. This bypasses the process set forth in the APA and congressional oversight. Despite this lack of transparency and bypassing the rulemaking process of the APA, healthcare facilities must comply with the certification process or not receive Medicare/Medicaid reimbursement.

The use of PPC's for housing of prisoners fails all three principle tests when applying transparency, integrity, and accountability to the DOJ's process of outsourcing. The common theme of lack of transparency holds true for PPCs, because they are private companies. The lack of accountability was noted in how PPC facilities are monitored. The lack of data on the outcomes from their facilities is staggering. The monies donated for political candidates through subsidiary companies and the millions of dollars put towards lobbying speak to the company's ability to influence federal contracts and policy making. The potential for pay-for-play although illegal, appears to alive and well in the modern administrative state. In this section it can be seen how federal contract negotiation by the government can cost billions of dollars as it did with Corecivic and the no bid contract for \$1billion it received in from the federal government inf 2016.

Applying the standards of integrity, transparency, and oversight to the federal defense contracts can leave people in a state of dismay. Despite numerous abuses by contracting companies with fines racking up in the millions, they continue to be awarded federal contracts. Despite prosecutions for civilian deaths and cruel and inhumane treatment of Abu Ghraib prisoners, private military companies continue to be awarded federal contracts for protective services by federal agencies.<sup>153</sup> Although federal contractor companies have been acknowledged for having hundreds of violations with only looking at three specific companies and costing millions of dollars in fines, they continue to be awarded federal contracts.

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<sup>153</sup> Laura Dickinson, "Contract is a Tool for Regulating Private Military Companies." From *Mercenaries to Market* (New York: Oxford University Press, 2007) 217-238.

The services and protections provided by the administrative state are essential to daily life of most Americans. The demands on the federal government to supply more all the while demanding that it be done with less, has led to outsourcing of some basic government functions. It could be argued that the administrative state has not diminished in size. But rather, much of the administrative state has become privatized. The concerns that come from this increase in privatizing some of the core functions of most federal agencies has revealed many shortcomings. From a pure public administration outlook, the present policy of outsourcing is not efficient because it is not actually cost efficient. The lack of oversight perpetuates fraud and abuses. When the present use of privatization of federal agency functions if viewed through the lens of the U.S. democracy, it becomes more complex. Not only should the federally outsourced products and services be expected to be efficient and cost effective by a public administration model, they should also be entwined with the democratic process.

The cases presented in this paper is not meant to imply that all agencies lack oversight or integrity. It does not imply that all private companies under federal contract are making their own rules without congressional approval. But until we clearly acknowledge the shortcomings of the present system, we will not be able to find a solution to those problems.

The expansion of services that federal agencies are expected to provide have left them lacking in expertise in many areas. In a study of over 300 federal managers, the responses showed that a main reason for outsourcing of agency responsibilities was to gain “unique

and in-demand skill sets.”<sup>154</sup> Agencies have expanded missions and budgetary limitations that lead them to seek private companies to provide services. The Department of Defense outsourcing of its IT service contractors was \$17.8 billion in 2019.<sup>155</sup>

Congress has the power of oversight by utilizing congressional committee hearings or passing statutes to expand or retract agency authority. Congress can also use the power of the purse against an agency to motivate a specific action from that agency.

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<sup>154</sup> Government Business Counsel, *“Inside Federal Outsourcing: A Candid Survey of Federal Managers,”* Government Executive Media Group, 2015, accessed July 4, 2021. <http://cdn.govexec.com/meWe> believe that without more specific reporting from DOD, Congress may not be able to effectively exercise its oversight responsibilities.

<sup>155</sup> Laura Crist and Chris Cornillie, *“DOD Could Spend Over 100% of IT Budget on Contracts: This is IT(1),”* January 31, 2021, accessed June 20, 2021. [bgov.com/news/dod-could-spend-over-100-of-it-budget-on-contracts-this-is-it/](https://www.bgov.com/news/dod-could-spend-over-100-of-it-budget-on-contracts-this-is-it/)

## **Conclusion**

This paper addresses the question, has the federal bureaucracy as it functions in contemporary American been able to maintain constitutional principles? The paper focused on the constitutional principles of citizen involvement in decision-making, accountability of the government to the people, and transparency. To answer this question, each chapter posed a unique question that independently may not provide enough information to answer the larger question. But the cumulative data from all three chapters very conclusive finds the answer to that question to be no.

At a superficial level, Woodrow Wilson's Theory of Public Administration might seem harmless. His theory was a method to have the business of the government conducted. But public administration is different than business administration. The stumbling block to his theory is the U.S. Constitution. Dwight Waldo had the foresight to understand the potential difficulties that might ensue with an administrative arm of the federal government when held up to the light of the Constitution.

This paper clearly shown three important facts. First, there is political bias within the federal bureaucracy. Second, the bureaucrats making the rules do not clearly understand whom they are regulating. These same bureaucrats do not think highly of the average citizen. From a statistical perspective, the political affiliation of most of the bureaucrats is different than the political affiliation of the majority of the general population. Third, the modern administrative state in many cases is no longer able to perform its duties. The amount of outsourcing or privatizing of government services is tremendous by any standard and lacks any formal process of accountability.

It appears the average American and most politicians have accepted that the federal bureaucracy is a necessary branch of the federal government. The U.S. Supreme Court has validated the federal bureaucracy and secured the preference of federal agency interpretation of vague statutes with *Chevron U.S.A. Inc v. Natural Resources Defense Council, Inc* (1984).<sup>156</sup> In more recent times *Massachusetts v. Environmental Protection Agency* (2007) the Supreme Court ruled that a federal agency does have to follow a statute when directed.<sup>157</sup> A federal agency cannot, not provide a regulation that is requested in a statute. With that being agreed upon, it only seems reasonable that the federal bureaucracy should be expected to function in a manner aligned with constitutional principles.

The survey discussed in chapter three reveals the rule makers do not seem to care what the rule followers think about the rules they make. An attitude like that may be acceptable in a monarchy or other forms of government. But, in a constitutional republic like the United States, the will of the people is paramount. Bureaucrats with that kind of an attitude are not in alignment with the philosophy on which the United States was built.

The lack of accountability and oversight by Congress can be seen in all chapters. Chapter one displays that federal agencies have the capacity to function in a politically bias manner despite supposed congressional oversight. Chapter three shows that with outsourcing, the oversight process has been diluted even more. It appears that Congressional oversight is predominately limited to putting out fires when scandals surface. A more direct approach to congressional oversight such as a bipartisan committee

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<sup>156</sup> "Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc." Oyez. Accessed July 11, 2021. <https://www.oyez.org/cases/1983/82-1005>.

<sup>157</sup> "Massachusetts v. Environmental Protection Agency." Oyez. Accessed July 15, 2021. <https://www.oyez.org/cases/2006/05-1120>.

could be developed with the sole purpose of overseeing the final regulations that agencies develop. Once reviewed by the committee, the proposed regulation could be presented to Congress to vote on. This accomplishes direct accountability by Congress about the appropriateness of the regulation. This method would also allow the general public to hold their members of Congress accountable for their voting record on specific regulations.

The lack of transparency which is such a fundamental core of the U.S. constitutional republic has all but disappeared with the use of private companies to conduct the business of the government. Despite the Freedom of Information Act, basic details and conditions about how private companies contracted by the federal government function are not available to the citizenry.

Waldo's description of an administrative arm of the government that must understand the will of the state, and then perform their services with the will of the state as guidance is very different than the federal bureaucracy of the 21<sup>st</sup> century in America. Waldo was concerned because there was no clear-cut method to reconcile the federal bureaucracy. Here we are many decades later and still struggling with how to reconcile a federal bureaucracy with democratic values.

If this paper does nothing else, the hope is it will bring light to the fact that the modern-day administrative state does not conduct business in a manner that upholds democratic principles. This paper by no means represents all federal agencies and bureaucrats. But what it does provide is evidence enough that large sectors of the administrative state do not conduct the business of government with oversight, transparency, nor citizen input. However, these concerns can be addressed with reform.

Reform of what, the federal bureaucracy, or Congress? Maybe reform of both? Some might agree that reform of both the federal bureaucracy and Congress is appropriate. What would reform of the federal bureaucracy look like? Perhaps more in services should be provided to tell federal employees not to think, talk, act, or promote any services or regulations that are stem from their personal ideology. Although much of this is already performed with federal employees, there is likely room for improvement. But what would this type of reform do for constitutional problems such as lack of oversight with outsourcing?

If there is transparency in government affairs but lack of citizen review, it serves no purpose. Americans have the privilege to be able to participate in their governance. Reform could come in the form of citizens writing, calling, or emailing their congressional representatives to hold them accountable. They could request oversight hearings or push for clarification of legislative language. Citizens can initiate litigation that can hold the government accountable. Individuals can sue an agency individually or join a special interest group's lawsuit. This is one method of self-governance and oversight that sets the United States apart from many other countries. Changing how Americans think and participate in government requires re-educating them. Presently, many Americans see the government as a paternalistic government. Not the citizen representative form of government it is designed to be. Changing this perception and encouraging participation in the government process could produce many changes in the function of the federal government.

Setting sights on congressional reform might bring out more robust results than the previous. Congress holds the key to two very important steps in the rulemaking process.



First, Congress grants authority to federal agencies to develop defined regulations. Second, congressional oversight is the key to accountability within the federal agencies and the way they conduct business. Some scholars believe that reforming Congress is one step upon which to deconstruct the massive administrative state.<sup>158</sup> True, there might be more adherence to constitutional principles if Congress had better oversight of agencies. Federal agencies, like children are more likely to perform better if they know that there is structure and oversight.<sup>159</sup> But without consistent oversight, the chances of adhering to basic constitutional principles diminishes.

Congress in theory can stop authorizing federal agencies to produce regulations. But why would they do that? Congress could uphold its constitutional responsibility of producing necessary legislation. Yes, it is a cumbersome process. The process for legislation to be passed through Congress include introduction, committee referral, referral to the body of Congress, and floor debates. Both bodies of Congress handle bills in different ways. The Framers made the legislative pathway slow and arduous to prevent an overly zealous federal government from overpowering individual or state rights.<sup>160</sup>

The chances of reforming Congress in the 21<sup>st</sup> century is very unlikely. Although the structure of Congress may not have changed a lot in the last decades, the centralizing of

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<sup>158</sup> Emmett McGroarty, Jane Robbins, and Erin Tuttle, *Deconstructing the Administrative State: The Fight for Liberty*. (Washington, DC: Liberty Hill Publishing, 2017) 51-65.

<sup>159</sup> "Home." *Centers for Disease Control and Prevention*, Centers for Disease Control and Prevention, 5 Nov. 2019, [www.cdc.gov/parents/essentials/structure/index.html](https://www.cdc.gov/parents/essentials/structure/index.html).

<sup>160</sup> Seth Turner. "The Framer's Knew that Slow and Steady Wins the Race", Congressional Management Foundation, updated September 2016. Accessed July 13, 2021. <https://www.congressfoundation.org/news>

the power to the Speaker of the House from committees has changed the functional dynamics. The days are gone that powerful bipartisan congressional committees would bring bills up to the Speaker of the House to present to the floor for vote. Asking for reform of Congress is asking them to self-regulate. They have no reason.

The highly polarized partisan politics of modern times have also made it more difficult to regulate Congress by the election process. The leadership of both major political parties have decades of service in Congress. These career politicians wield tremendous influence and money to maintain their positions. It is a rare case in which an incumbent with decades of being in Congress loses an election. Specifically in these polarized times, where voters are less likely to remove powerful incumbents unless there have egregious violations of law or ethics.

If Americans were lucky enough to make donkeys fly and congressional to reform to take place, it would still do nothing to provide structural pathway that is constitutional for all federal agencies to conduct business. This situation resembles a dysfunctional family that will not talk about the “elephant in the room.” The parents do not want to discuss it because they do not know how to handle it or don’t like confrontation. Because the parents do not address the problem and provide guidance and structure to their children, they will most likely continue to display behavior problems.

In this hypothetical scenario, the U.S. political system at large are the parents. The administrative state are the children. The children are misbehaving because they lack the necessary guidance and structure that the Constitution can provide. At the present time, the bureaucracy is misbehaving as has been shown in this paper. There does not seem to

be active conversation about an overhaul of the federal bureaucracy. That might be because those that can introduce that topic are busy trying to gain power over it instead.

It seems oddly simple that a constitutional amendment could provide a solution to the federal bureaucracies' lack of constitutional principles. Woodrow Wilson thought the Constitution was an obstacle to his new theory to remake the federal government.<sup>161</sup> He thought the U.S. Constitution was, "insufficiently democratic and overly suspicious of the popular will."<sup>162</sup> President Wilson did not attempt to amend the Constitution to embrace his theory and provide the necessary structure for federal bureaucracy. Instead, he implemented his plan without constitutional guidance's. It appears that the American people, for the most part have accepted with naivety the federal bureaucracy because of all the services and securities it provides.

But as this paper has shown, the lack of concern about the will of the people, the lack of accountability, and lack of oversight have led to what appears at times an autonomous federal administration that has very few control mechanisms. The hundreds of billions of dollars spent by agencies to privatize government services with no transparency is more than the average American can conceive.

A constitutional amendment could be written that could embrace the federal bureaucracy. This may seem like a lofty goal. But history has shown us that when the Articles of Confederation did not properly represent the nation that the United States was become, leaders organized and wrote the Constitution. Embedded in the Constitution is

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<sup>161</sup> Ronald Pestritto. "Roosevelt, Wilson, and the Democratic Theory of National Progressivism." *Social Philosophy and Policy* 29, no 2. (July 2012): 318-334.

<sup>162</sup> Ibid.

the method to amend it as times and circumstances change. This process has taken place twenty-seven times in the history of this nation. A committee could be organized that resembled the constitutional convention. Two leaders from all states could gather to design the 4<sup>th</sup> branch of government with the constitutional principles embedded in it. This is no easy feat. But in the history of the United States, citizens have pushed members of Congress to amend the Constitution for other matters of urgency such as civil rights. Discussion on how to design the structure for the federal bureaucracy might find that some of the services provided by federal agencies could be better managed by State governments.

It appears that the administrative state is functioning in some sort of organized chaos. It has grown to the point that some agencies can no longer effectively do their jobs without assistance from private companies. In many cases, it no longer adheres to the democratic values that are fundamental to the United States. It is time for change.

It is on the edge of chaos that change takes place.

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## **Curriculum Vitae**

**Melissa Ann Dean, MD**

### **EDUCATION**

Medical Degree, Internal Medicine, Ross University Medical School, 2003

MS Nutrition & Metabolism, University of South Florida, 2012

MSN, University of South Florida, 1998

BSN, Florida Atlantic University, 1997

ADN, Indian River State College, 1993

### **Military**

United States Air Force Reserves, Captain Retired

### **WORK HISTORY**

Dean Wellness Institute, Private Practice, 2008-Present

Belgian Acres Draft Horse Carriage Company, Draft Horse Carriage Driver, 2008-Present

Florida Atlantic University, Master's Nursing Practicum Instructor, 2010-Present

Hospice of Indian River County, Associate Medical Director, 2007-2015

Central Florida Critical Care & Pulmonary, 2004-2007

Johns Hopkins Bayview Hospital, BSN/Medical Student: neuroscience unit, 2002-2003.

### **HONORS AND AWARDS**

- Out Standing Citizen of Orlando 2006
- Sigma Theta Tau

### **COMMUNITY ACTIVITIES**

- Board Member Newport Club, nonprofit, 2009-2011
- Board President, Unity Church of Vero Beach

### **PUBLICATIONS**

- Defying My Fate, *An Autobiography of a Soul*, 2020
- Resolution of Papillary Mucinosus in a Person With HIV Infection, *The Aids Reader*, 17(8):418-20, September 2007.

### **PROFESSIONAL MEMBERSHIPS**

- American Academy for the Advancement of Medicine
- Florida Board of Medicine
- West Virginia Board of Medicine
- American Academy of Antiaging Medicine